

No. 14805

United States
Court of Appeals
for the Ninth Circuit.

AMERICAN PACIFIC DAIRY PRODUCTS,
INC., a Corporation,

Appellant,

vs.

JOSEPH A. SICILIANO,

Appellee.

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vs.

AMERICAN PACIFIC DAIRY PRODUCTS,
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Transcript of Record
In Two Volumes

Volume II
(Pages 259 to 511)

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Appeals from the District Court of
for the District of Guam,
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(Testimony of Edward Thompson.)

Cross-Examination

By Mr. Phelan:

Q. I think there are several things that were left hanging in the air. First of all, Mr. Thompson, you were testifying about those reports. What reports were made under the control of American Pacific Dairy Products? [144]

A. Those after Norman Thompson got here.

Q. From April, '53?

A. From May, '53, say.

Q. Now, the other reports prior to that were the ones that were in the records made by Mr. Diza?

A. They were compiled from the records made by Mr. Diza, but Norman compiled some of them from the records.

Q. From the available records? A. Yes.

Q. Now, what you have been giving today has been the figures on those reports? A. Oh, yes.

Q. Now, there was a list of checks you were asked about, some drawn to American Pacific Dairy Products. Do you know what those checks were for, drawn to the corporation?

A. Well, there was one check for \$7,500 which was the payment of a loan but the greater part of them were for supplies that I had been asked to buy for the company.

Q. Do the books show the amount of supplies you bought for the company?

A. I made a report to Henry and later on to Norman every month.

(Testimony of Edward Thompson.)

Q. Do you have those reports?

A. Yes; I made a report every month of the money I received and the invoices I paid. [145]

Q. I would like to know—over \$100,000 you testified went to the States. I would like to know where it went when it got there?

A. Oh, all of it went to pay legitimate bills for supplies. Well, that \$7,500 was legitimate, too. That was money loaned to the corporation.

Q. At the time you formed the business?

A. At the time we formed the partnership, yes, out of the \$15,000. I think he paid \$7,500 to the bank account here and he gave me a check for \$7,500, which I sent to the corporation.

Q. Now, the balance of the funds that were drawn to the corporation can you tell us what those checks were for?

A. Most of the checks were drawn to me. When we first started I was doing all the buying and paying the bills. It took some time to get the money over here and sometimes I was out \$5,000 or \$6,000. Later he would send me 5 or \$6,000 in round figures and—

Q. Have you got complete records of that?

A. Yes.

Q. The supporting vouchers, too?

A. Oh, yes; they were in duplicate. I kept one and Henry Diza got the other one.

Q. For every purchase you made in the States you sent Mr. Diza an invoice?

(Testimony of Edward Thompson.)

A. Oh, yes, and bills of lading and, of course, he checked [146] when the stuff came in.

Q. Now, of that money that went to the States, did you retain any of it personally?

A. No, sir; unless once in awhile I might spend \$5.00 or \$10.00 and I would make a petty cash voucher and send that. I know I have done that once or twice.

Q. The petty cash was for the Dairy Queen?

A. Yes, for long-distance telephone, air mail, parcel postage and things like that.

Q. Now, the money that went to the corporation outside of the purchase price of \$15,000—what did the rest of the money that went to the corporation represent?

A. Oh, to pay for supplies. If I had the money in my personal bank account I would pay it out of my personal bank account because it was easier than going out and getting signatures, so I would take the company's funds and pay for it but they would always be reimbursed.

Q. So all were reimbursed from Dairy Queen?

A. Not all for Dairy Queen. We spent some money for this new store.

Q. But there was the reimbursement for the money spent?

A. No; freight—I paid freight bills. Freight bills were always prepaid, but I would always pay the freight bills and I would send a charge for the shipping company for the freight bills. [147]

Q. Now, you have complete records—that is the

(Testimony of Edward Thompson.)

corporation has complete records of the transactions from the date Norman Thompson took over?

A. Yes.

Q. And supporting vouchers? A. Oh, yes.

Q. What kind of records has the corporation got for the period before Norman Thompson took over?

A. Well, we didn't go into that very thoroughly. Most of the payments were in cash and it would be very difficult to dig into, so we just accepted the figures and went on from there. We've got these records here. You mean invoices and stuff like that?

Q. Invoices, yes.

A. Yes; there wouldn't be many of those. Most of the things were bought in the States—the big items. A few small items would be bought around town but we didn't pay much attention. We didn't attempt to verify any of those.

Q. So that those reports for the first period you accepted the figures that Mr. Diza put on them but from the time Norman Thompson took over you have all the supporting documents?

A. I have supporting documents of those things I paid for, too. Yes, we have supporting documents now.

Q. At the time—sometimes you advanced your own funds [148] and were reimbursed?

A. Yes.

Q. Does anybody draw a salary from American Pacific Dairy Products? A. Norman does.

Q. Does anybody else?

A. None of the officers. Is that what you mean?

(Testimony of Edward Thompson.)

Q. Outside of the people working out here nobody does? A. Nobody draws any salary.

Q. Now, this profit figure that you were discussing is a computed profit based upon what records were available?

A. It was based—we just used the reports we had.

Q. You used Henry Diza's reports and based upon that you computed your profit?

A. We started from there, yes.

Q. And then from the time Norman took over——

A. We used actual sales and actual expenses.

Q. You haven't got the figures readily available by fiscal-year periods?

A. No, I haven't here, no.

Mr. Phelan: At this time I have no further questions.

Redirect Examination

By Mr. Bohn:

Q. You say you have complete records for the period of time since Norman Thompson took [149] over? A. Yes; we have those records.

Q. Where are they? A. Here.

Q. Completely here? A. Yes.

Q. Invoices and everything else?

A. They are not here, no. We didn't bring down invoices and things like that.

Q. You have them in Guam?

A. Yes; bills of lading, receiving tickets and things like that.

(Testimony of Edward Thompson.)

Q. Do you have a general ledger?

A. Yes; this book.

Q. When does that ledger start?

A. June, 1953.

Q. Where are all the ledger sheets prior to July, '53?

A. I don't know.

Q. Were they turned over to you?

A. No, sir.

Q. Were they turned over to Norman Thompson?

A. I think so.

Q. Do you know where they are?

A. No, sir; we have looked for them but we haven't been able to find them.

Mr. Bohn: I have no further questions. [150]

Examination

By the Court:

Q. I am about to recapitulate here while Mr. Thompson is on the stand. Now, first, Mr. Thompson, you formed a corporation?

A. That is right, sir.

Q. And you had approximately \$42,500 paid-in capital?

A. A little over \$42,000—\$42,750 paid in.

Q. Does the corporation owe any money at this time?

A. It might owe current bills, yes, but nothing much. Stuff in transit is even paid for.

Q. Now this capital was raised primarily to open up a store or stores in Guam, is that correct?

(Testimony of Edward Thompson.)

A. That is correct, sir.

Q. Have you ever paid a dividend?

A. No, sir.

Q. And you have paid no salaries except for managerial services?

A. None for officers or stockholders, no, sir.

Q. Now tell me what your assets are as of this time—the corporate assets?

A. I can give it to you approximately. I haven't it up to date.

Q. Well, what is your cash in bank?

A. Cash in bank right now would be about 8 or \$9,000, I would say.

Q. On your corporate books, what do you carry the Dairy [151] Queen as being worth?

A. On the corporate books, including the investment in the other things, we have about \$70,000. That includes cash in bank and everything, your Honor, inventories, buildings, office equipment, store equipment and prepaid expenses—it all runs about \$70,000.

Q. Now, how many shares of stock did you get for your investment in Guam Frozen Products?

A. We got 1,750 shares at par value of \$10 a share. That is included in the \$70,000, which is a rough approximate figure.

Q. Out of 3,500?

A. Out of 2,500 we have 70 per cent of that.

Q. So that Mrs. Litch and Mr. Hevessy only own 25 per cent? A. 30 per cent.

Q. They own 750 shares which is 30 per cent.

(Testimony of Edward Thompson.)

Well, if you own 1,750— A. Yes.

Q. You own 70 per cent of Guam Frozen Products and for that 70 per cent you put in roughly 22 or 23—

A. No, sir; we put in the balance as accounts receivable—\$17,500 and Guam Frozen Products owes us around \$5,000 on open account.

Q. Well, now, in round figures then at the present time you figure that the corporation is worth roughly \$30,000 over and above its paid-in [152] capital? A. Yes; roughly, \$30,000.

Q. Over and above its paid-in capital?

A. That is correct, yes. I may be a thousand off but that is close enough.

The Court: Do you have any questions, gentlemen. on that analysis?

Mr. Bohn: Just one on a point that your Honor was bringing up a moment ago about the total amount.

Reredirect Examination

By Mr. Bohn:

Q. You testified in response to a question from the court—you stated your original paid-in capital was \$42,000? A. \$42,000 plus, yes.

Q. It is a fact, is it not, you overspent on the building as a result of your deal with Siciliano? You admitted you had overspent and, therefore, the total capitalization at that time was reduced to \$30,000?

Mr. Phelan: That doesn't make sense. You don't

(Testimony of Edward Thompson.)

reduce a corporation's capitalization. You are confusing a partnership here and investment in a building.

Mr. Bohn: Perhaps I am. I will put it another way.

Q. (By Mr. Bohn): Your paid-in capital was about \$43,000? A. That is right, yes, sir.

Q. Now, as a result of negotiations and because the building cost more than it should have—isn't that right? [153] A. I am quite sure, yes.

Q. As a result of that when you made your deal with Siciliano, the partnership which consisted of all the assets of Dairy Queen had a capital of \$30,000?

A. \$38,000—we knocked off about \$4,000.

Q. And the reason it was \$38,000 was because \$8,000 was owed in bills?

A. That is right, yes.

Q. So it represented \$15,000 cash, \$15,000 of Siciliano's cash he paid to you and \$8,000 in bills? That was the capitalization of Dairy Queen when you started?

A. I don't know whether we owed \$8,000 in bills.

Q. Anything over?

A. No; they owed that to us. The partnership was to pay us that \$8,000.

Q. Who was to pay Overseas Construction?

A. The partnership was to pay that and charge us against the \$8,000 due us.

(Testimony of Edward Thompson.)

Q. As you started out with your partnership agreement you had a capitalization of \$38,000, whatever it is, which represents \$15,000 of yours and \$15,000 of Siciliano's and the balance was reflected in debts?

A. No; the balance is excess in value that was turned in and it was to come to us.

Q. But there was the \$8,000 in debts? [154]

A. No; \$8,000 debts to American Pacific.

Q. I am getting argumentative about the debt. I apologize to the court. Isn't it a fact that at the time you made this deal Dairy Queen of Guam owed Overseas Construction?

A. We owed Overseas Construction about \$5,000. We might have owed other creditors; I don't know.

Q. So the real capitalization at that date was about \$35,000? A. No, sir; \$38,000.

Q. The partnership paid it to you and you paid the bills? A. Yes; same thing.

Q. In other words, the net worth was roughly \$30,000? A. No; roughly \$33,000.

Q. You started the Dairy Queen then under the partnership agreement with a net worth of roughly \$33,000? A. That is right, yes.

Q. You stated the organization which you now call American Pacific Dairy Products spent for the benefit of Guam Frozen Products something over \$23,000?

A. We did not reduce our books because of the excess of charge for the building. In doing business with Joe, Joe said, "You paid too much for the

(Testimony of Edward Thompson.)

building." I said, "I think so, too," so we cut it down for a meeting of the minds, your Honor, but we still made that money.

The Court: What you are saying is that the corporation [155] took a loss which it expected to make up out of profits?

A. But that figure of \$70,000—that includes the \$4,000 we were going to write off.

The Court: Now at the expense possibly of oversimplifying this, if the corporation and Mr. Siciliano had continued as a co-partnership at the present time the corporation would have made \$15,000 and Mr. Siciliano would have made \$15,000?

A. That is very close to the correct figures, your Honor.

The Court: That would be profit?

A. Yes; it is very close to that.

The Court: Now you say that your assets at the present time are roughly \$80,000?

A. \$70,000, your Honor.

The Court: Roughly, \$70,000. Now, what do you carry on your books as liabilities?

A. We have very few liabilities.

The Court: What about that \$15,000?

A. We have that \$15,000 that is due to Siciliano.

The Court: You carry that on your books as a debt to him?

A. Yes, sir.

The Court: Have you ever tendered it to him?

A. We tried to do it but we had a court order on that preventing paying Mr. Siciliano. Then a

(Testimony of Edward Thompson.)

receiver's estate, I guess you call it estate, was set up but I find there was no [156] receiver and by stipulation of counsel there was no receiver appointed, was there?

Mr. Phelan: If it please the court, I was counsel in that case and there was a period when there was no receiver and there was a change in receiver and then for a period counsel were receivers, all the counsel were receivers and no one wanted to pick up any money because you just moved it from one bank to another.

The Court: Now assuming for purposes of argument only that Mr. Siciliano is entitled to his share of the profits and to a 50 per cent interest in the assets that resulted from that partnership, according to your own figures, if you were to buy him out tomorrow, you would have to pay him \$35,000?

A. \$30,000 I would say because part of that \$70,000 represents the inflated cost of the building.

The Court: You are carrying that——

A. On our books it is carried at the original cost price.

The Court: Now you have already paid two years' income taxes?

A. Yes, sir.

The Court: I suppose you set that building up on a depreciation basis for about five years, didn't you?

A. No, sir; we set it up on a ten-year basis, I think.

(Testimony of Edward Thompson.)

The Court: Five and five, according to your lease?

A. Yes. [157]

The Court: So your depreciation is about ten per cent per year?

A. That is about what we are doing, yes.

The Court: And, of course, on your other assets you took depreciation?

A. But that is reflected in the profit, too.

The Court: So as of this date upon the hypothesis that I have advanced, Mr. Siciliano's interest would be \$30,000?

A. I think that is about right.

Mr. Phelan: May I ask a question to clarify these figures? This other suit reflects a demand for approximately \$13,000 or \$14,000. Mr. Thompson, have you allowed for that in these net worth figures you have given?

A. We have allowed for some of it—about \$4,000 of it.

Mr. Phelan: So it is possible that the total figure would be about \$10,000 less?

A. There is the possibility that it would be changed by anything that might come up, yes.

The Court: You carry it as a debt of \$10,000?

A. That might be paid as a result of this other claim—this Pacific Enterprises claim.

The Court: As I understand the testimony, there were some supplies purchased and other things and some services rendered?

A. Yes, there were. [158]

The Court: Very well. You may be excused at this time. Call your next witness.

Mr. Bohn: I have one suggestion to make to the court in connection with the previous discussion just concluded. It is our view that—we don't have proof because we don't have access to all the figures—it is our view that the profit on this business from the day it started until December 31, 1954, before the payment of taxes, was at least \$60,000 profit alone from the operation of the business, in addition to whatever the business is now worth as an operating business with its assets.

The Court: Yes, we are merely getting at a hypothetical case at this time. You have no basis for that statement, though, in the accounts that you have or the records that you have received, do you?

Mr. Bohn: Yes, we do. To repeat a few of those figures—according to our records, as of May 31, 1953, there was already \$31,000 made by that time, and there is the complete operation from May, '53, to December 31, '54, which is a year and a half, and they show various adjusted figures. In one case they say the profit is \$26,000 and in another case they say a \$16,000 profit figure. I think a complete audit would show as of the end of the second fiscal year, August 31, 1953, profit to be in the neighborhood of \$32,000 and that would be before the payment of taxes. The profit figures are quite low for the next year, [159] \$15,000 or \$16,000. Even that would total close to \$60,000. I am inclined to believe those profit figures. I shouldn't state this—

Mr. Phelan: For September, October, Novem-

ber and December and January they operated at a loss.

Mr. Bohn: That is right. May Mr. Siciliano remain through the questioning or do you wish to have him excluded in accordance with your order?

The Court: No, my order was by your stipulation all witnesses should be excluded except one witness for the plaintiff and one witness for the defense. Now you don't have that. I am speaking of having a witness constantly available to counsel to advise on the process.

Mr. Bohn: I misunderstood your Honor. I am sorry.

ERNESTO O. DIZA

called as a witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Bohn:

Q. What is your full name?

A. Ernesto O. Diza.

Q. And how do you spell that name?

A. E-r-n-e-s-t-o O. D-i-z-a.

Q. Where do you live, Mr. Diza?

A. On Guam, sir, or do you mean the Philip-pines? [160]

Q. Where do you live in Guam?

A. In Tamuning, sir.

Q. In Tamuning? A. That is right, sir.

Q. How long have you been on Guam, Mr. Diza?

(Testimony of Ernesto O. Diza.)

A. I arrived on Guam in July, '48.

Q. July, '48? A. Yes, sir.

Q. Have you made any trips off Guam since that time? A. I went home in March, 1953.

Q. You were gone how long?

A. Until April 9, 1953.

Q. Vacation? A. That is right, sir.

Q. And your home is where?

A. Santa Maria Tomas.

Q. In the Philippine Islands?

A. In the Philippine Islands.

Q. Now with the exception of that short period in 1953 have you been continuously in Guam all that time? A. I beg your pardon?

Q. Did you take more than one trip off Guam?

A. Just one trip.

Q. Where have you been employed during this period of time? [161]

A. In 1948 I was employed at Harmon Field Restaurant.

Q. Who operated that? A. Mr. Siciliano.

Q. He was a concessionaire? A. Yes.

Q. How long did you work out at Harmon Field?

A. I worked there from 1948 until 1950, sir. I don't remember very well.

Q. After you stopped working there where did you go? A. Pacific Enterprises.

Q. And are you presently working for Pacific Enterprises? A. Yes, sir, that is right, sir.

Q. That continues up to today?

(Testimony of Ernesto O. Diza.)

A. That is right.

Q. What are your duties at Pacific Enterprises?

A. Bookkeeping.

Q. Bookkeeper at the present? Calling your attention to the period of time June 22, 1952, to April, 1953, were you acting as accountant for Pacific Enterprises during that time?

A. That is right, sir.

Q. Did you also during that period as part of your duties keep the books of account for Dairy Queen of Guam?

A. Yes, sir, that is right, sir.

Q. When did you start those accounts for Dairy Queen?

A. I started posting June 22, '52. [162]

Q. Started posting? A. (Nods head.)

Q. Do you recall when you last posted those accounts? A. My last posting is April 17, '53.

Q. And at that time who took over the books?

A. Mr. Norman Thompson.

Q. Had he been working with you at Pacific Enterprises prior to the time he started posting?

A. Yes, he worked with me a couple of weeks.

Q. At Pacific Enterprises' office? A. Yes.

Q. And then he took the books from Pacific Enterprises, is that correct?

A. That is right, sir.

Q. Have you seen them since?

A. Well, he called me once and that is all I saw the books.

Q. But the books have not been in your posses-

(Testimony of Ernesto O. Diza.)

sion until today? A. No, sir.

Q. Did you keep a general ledger for the Dairy Queen? A. That is right, sir.

Q. Is this bound book the one in which you kept the ledger? A. That is right, sir.

Q. Will you look at that book and tell me what is the [163] first entry?

A. The first entry is supposed to be June, 1952, and not July as this book shows.

Q. Can you find the first entry, Mr. Diza?

A. No, I cannot find it, sir; that is what I am looking for now.

Q. Let me ask the question this way—is there any entry in those pages made by you?

A. Not at all, sir, but this is the cover of the book I used.

Q. But there are none made by you?

A. None at all, sir.

Q. Were there complete entries in the general ledger made by you prior to the time you turned it over to Mr. Norman Thompson?

A. That is right, sir.

Q. And you turned those complete entries over to him? A. That is right, sir.

Q. You also kept a cash book of cash entries?

A. That is right, sir.

Q. Is that the book I am now putting in front of you? A. Yes.

Q. Is that the one? A. (Nods head.)

Q. What is the first entry made by you in that cash book? [164]

(Testimony of Ernesto O. Diza.)

A. Daily sales report, sir.

Q. And what date? A. June 22, 1952.

Q. And what is the last entry made by you in that book?

A. The last entry on cash disbursements is January 16, 1953.

Q. January 16 and what is the last entry on cash income? A. Cash income is April 17, 1953.

Q. The last entry made by yourself?

A. That is right, sir.

Q. Now does that book contain cash entries for the months of April—will you take a look, please, and see—— A. That is right, sir.

Q. Are there some entries in May?

A. Yes.

Q. Those were not made by you, however?

A. No, sir.

Q. Are there any entries at all for June?

A. No entries here for June.

Q. The last entry is in May and when is the next one? This is June of '53?

A. No, there is no entry for June of 1953.

Q. What is the next entry after May of '53?

A. The income shows in August, 1953. [165]

Q. No entries for June or July, is that correct?

A. On July there is no entry.

Q. Neither June or July?

A. No entry for August, too.

Q. No entry for August either? A. No.

The Court: Do I understand this cash book rep-

(Testimony of Ernesto O. Diza.)

resents only cash taken in or does it represent expenditures?

A. Expenditures and cash taken in, sir.

Q. (By Mr. Bohn): And did you turn this cash book over to Mr. Norman Thompson with the rest of the books? A. That is right, sir.

Q. And were each one of your cash disbursements supported by vouchers?

A. That is right, sir.

Q. Did you turn all of the vouchers over to Mr. Norman Thompson? A. That is right, sir.

Q. Did you maintain a correspondence file for the Dairy Queen?

A. There was but I turned it over to Mr. Norman Thompson.

Q. You maintained a correspondence file until he took over, is that correct?

A. That is right, sir.

Q. Did that correspondence file contain copies of reports [166] that you mailed to Mr. Thompson?

A. That is right, sir.

Q. Did it contain also letters from Mr. Edward Thompson? A. That is right, sir.

Q. Did it contain copies of letters from you to him? A. That is right, too, sir.

Q. That complete correspondence file was turned over to Mr. Norman Thompson, is that correct?

A. That is correct, sir.

Q. Did you maintain any other records that were turned over to Mr. Norman Thompson?

(Testimony of Ernesto O. Diza.)

A. I turned over journal vouchers, correspondence and shipping documents.

Q. Shipping documents? A. Um huh.

Q. All of your vouchers?

A. Yes, all of the vouchers.

Q. Who handled the cash for the Dairy Queen during the period of time you were keeping the books? A. First is Madeline Dorsit.

Q. And how long did she handle the cash?

A. Well, I don't remember very well when she left the island.

Q. Would it have been approximately one or two months after Mr. Siciliano left? [167]

A. That's about right, sir.

Q. Well, now after she left the island who handled the cash?

A. She advised me—she instructed me to handle the cash and do the same procedure what she was doing.

Q. How was that actually done? Who gave you the money? A. Mr. Meggo.

Q. And what did you do with the money after you got it?

A. I counted the money and entered it in my cash book.

Q. What did you do with the money?

A. Put it in the safe, sir.

Q. Did you send any money to Mr. Thompson?

A. I sent some money, sir.

Q. Did you do that by going to the bank and buying a bank draft? A. That is right, sir.

(Testimony of Ernesto O. Diza.)

Q. Did you also deposit money in the Bank of America? A. That is right, too, sir.

Q. Did you mail checks to Mr. Edward Thompson at his request for his signature?

A. That is right, sir.

Q. And you maintained a complete record of those checks? A. That is right, sir.

Q. And you turned those canceled checks over to Norman Thompson at the same time you turned the other books over? [169]

A. No, I was not able to get the blank checks because I was not authorized to get any money, any statement from the bank, so therefore whoever took the statements from the Bank of America took the checks with his signature.

Q. You didn't get the monthly bank statements?

A. No, I didn't, sir.

Q. So you didn't have them in your possession?

A. No, sir.

Q. Did you supervise—withdraw that question. Did you make frequent trips to the Dairy Queen?

A. Not so frequent.

Q. About how often would you go down?

A. About three times a week.

Q. What would be the purpose of those trips?

A. Well, just check the sanitation, check the boys and see if they were working right.

Q. On the job? A. That is right.

Q. Did you communicate with Mr. Thompson during this period of time, send him reports and let him know how the business was going along?

(Testimony of Ernesto O. Diza.)

A. Yes, I sent him monthly statements, sir.

Q. You were not in the room, Mr. Diza, but earlier in the trial Mr. Thompson identified a series of monthly statements which he said had been received from you, and I am just going to [169] ask you to identify one or two of them and ask you if that is the form you sent them to the States in. Are you able to identify the ones you made?

A. Yes.

Q. Well, this particular statement happens to be dated November 30 and indicates a trial balance from June 22 to November 30, 1952, and I will ask you if you made this report to Mr. Thompson?

A. Yes, I made this report, sir.

Q. And this report as a matter of fact contains what purports to be your signature? Is that your signature?

A. That's my signature.

Q. Just below where it says certified correct?

A. (Nods head.)

Q. This report contains a trial balance as of that date, a profit and loss statement, June 22 to November 30, 1952, a financial statement of assets and liabilities and a breakdown of disbursements and similar matters pertinent to the report. The report is also broken down indicating what was paid for wages, salaries, light and power, postage and various matters, is that correct?

A. That is correct, sir.

Q. Now is that similar to the monthly report you sent to Mr. Thompson each month?

A. That is right, sir. [170]

(Testimony of Ernesto O. Diza.)

Q. And did you send those reports for the whole time before the books were turned over to Norman Thompson?

A. I am not too sure about that, sir, whether I sent him all the monthly statements that I made.

Q. You would be able to state with exactitude if you had the correspondence file that you turned over to Norman Thompson?

Mr. Phelan: Well, I don't think that is pertinent in here—these comments and long discussions with the witness. I think the witness should testify to what he knows.

The Court: Well, I don't think it makes any difference.

Q. (By Mr. Bohn): I show you another report which is for the period June 22 to December 31, 1952. It appears to have your signature and I will ask you if this is the report you made up and sent?

A. Yes.

Q. This is your report?

A. That is my report, sir.

Q. And this report contains the same sort of material as the previous report just mentioned, is that correct? A. Yes, sir.

Q. And an inventory?

A. It also includes an inventory as of December 31, 1952.

Q. That is a complete inventory of goods on hand, is that correct?

A. That is correct, sir. [171]

(Testimony of Ernesto O. Diza.)

Q. There is attached to it also a letter dated February 16, 1953, directed to Mr. Thompson which bears your signature and generally reports on various matters, is that correct?

A. That is correct, sir.

Q. I show you another report covering the period June 22 to September 30, 1952, and ask you to examine that report and tell me whether that is a report you made up and sent to Mr. Thompson?

A. Yes, I made this statement.

Q. That report also contains similar information to the previous reports including inventory?

A. That is right, sir.

Q. I show you what purports to be another report for the period June 22 to October 31, 1952, which contains what purports to be your signature and I will ask you if you made that report and sent it to Mr. Thompson?

The Court: Is it necessary to go over every one of them?

Mr. Bohn: Perhaps not, your Honor. I am only seeking to prove——

The Court: You said you wanted to ask about one or two of them and you are now up to four or five.

Mr. Phelan: I have just one question. What are you trying to prove by these reports?

Mr. Bohn: The fact that they were made and sent to Mr. Thompson. That is all I am trying to prove. If you will [172] stipulate they were.

(Testimony of Ernesto O. Diza.)

The Court: Mr. Thompson said he accepted them as being correct.

Mr. Phelan: He did not state he got them monthly or on time. He said there were reports for every month.

The Court: He said he accepted the reports because it was so difficult to go in back of them. We have to assume they are correct.

Mr. Phelan: Well, he didn't testify that he got them monthly or on time.

The Court: What difference does it make?

Mr. Phelan: It might make a lot of difference.

The Court: He testified that he got them.

Mr. Phelan: Yes.

The Court: He testified that he accepted them as being correct.

Mr. Phelan: Yes, but I think it is material to our case as to whether or not they came when they were supposed to come or weeks late. I notice that the letter on the December 31 one was dated in February.

The Court: Well, we don't know about that, of course. Mr. Thompson testified that he got his checks and they were always late but he got them. I don't see what your point is. The question is was money taken in, was money paid out and has it been accounted for to the satisfaction of the corporation. [173] Now the Court isn't concerned with anything more than that.

Mr. Phelan: Well, there is another question in

(Testimony of Ernesto O. Diza.)

this case, sir, and that is management. We can't lose sight of that.

The Court: Well, you can take that up in connection with your defense.

Mr. Phelan: But I don't want something read into the record that will be contrary to what we will try to prove.

The Court: All he has testified to is these are his reports.

Mr. Bohn: In the interest of saving time, I will not proceed further with that line of questioning.

The Court: No, you have shown that they are his reports and they were accepted by Mr. Thompson and he accepted their validity. I don't know why you have to go further.

Mr. Bohn: I have no further questions of this witness.

Cross-Examination

By Mr. Phelan:

Q. Mr. Diza, you were the accountant for Pacific Enterprises during this period?

A. That is right, sir.

Q. What were your duties at Pacific Enterprises? A. I was the bookkeeper.

Q. Talk into the microphone.

A. Bookkeeper and office manager at the same time, sir.

Q. You were office manager? [174]

A. That is right, sir.

(Testimony of Ernesto O. Diza.)

Q. What were your duties in connection with the Dairy Queen of Guam?

A. I was also the bookkeeper for the Dairy Queen of Guam.

Q. Did you post all the books?

A. That is right, sir.

Q. Did you post them daily?

A. That is right, sir.

Q. When was the last date you posted an entry in them that you remember posting?

A. April 17, 1953, sir.

Q. That is the last day you remember?

A. That is right, sir.

Q. Now was that the day that the entry was made for or the day you made the entry?

A. That is the day I made the entry, sir.

Q. And on that date you had posted everything up to date in those books?

A. That is right, sir.

Q. Now how often did you go down to the Dairy Queen?

A. Not so often, sir, but I go there at least three times a week maybe.

Q. What time of day?

A. Well, about 4 o'clock in the day—sometimes nighttime. [175]

Q. What would you do when you were down there?

A. I would see that everything is all right, that we don't have anything needed. They ask me if

(Testimony of Ernesto O. Diza.)

they want anything—just to help the boys, help them clean the store.

Q. You helped them clean the store?

A. Yes.

Q. Who told you to go down there to do that?

A. Just my own free will, sir, to help the boys.

Q. Did you go down there on your off-duty time? A. That is right.

Q. So you went down there on your own to help your friends?

A. Not to help my friends but to help the Dairy Queen.

Q. Now how many entries did you make in the books on the average day?

A. Receipts, disbursements, I'd say then check the entries. About three items a day, sir.

Q. Three entries to post a day? A. Yea.

Q. How much time did you spend each day?

A. Each day only three entries will take you less than five minutes a day.

Q. So on the average your bookkeeping took you five minutes a day on the Dairy Queen?

A. No, half an hour checking everything.

Q. Now how did you handle the money at the Dairy Queen? [176]

A. Well, I counted the money when Mr. Meggo turned the cash in.

Q. When did he turn the cash in?

A. Every morning, sir.

Q. He turned it in once a day?

A. That is right, sir.

(Testimony of Ernesto O. Diza.)

Q. How did he turn it in to you?

A. In a bag, sir, money bag.

Q. Did he have cash register tapes with that?

A. No, readings, sir, not a tape.

Q. Did he turn in a reading every day?

A. Yes, a reading every day.

Q. What time of the day was the reading taken?

A. Well, sometimes at nighttime, sir.

Q. It was taken at night?

A. Because they close at night.

Q. It was taken in the evening?

A. No, after closing time.

Q. The reading was taken off the cash register when they closed?

A. That is right, sir.

Q. And once a day the tape was turned in to you?

A. That is right, sir.

Q. Did you make a cash bank up for the operation of the Dairy Queen change fund? [177]

A. That is right, sir.

Q. How much was that change fund?

A. Well, sometimes I think it's \$100; sometimes \$150.

Q. Who did you give that change fund to?

A. Mr. Meggo, sir.

Q. When would you give it to him?

A. When he would go to the store to change the bank.

Q. When would that be?

A. Well, every afternoon. He changed the bank in the morning and afternoon.

(Testimony of Ernesto O. Diza.)

Q. How many times did you take a reading of the tape?

A. Just one time, sir. He read the adding machine tape at night.

Q. Is there a counter on that machine?

A. No, sir, there is a reading.

Q. There is an indicator that gives you a reading?

A. That is right, sir.

Q. Are you familiar with that machine? Do you know the use of that machine?

A. Yes, sir.

Q. Can it be set back and does it continue operating?

A. You can clear it, sir, after the business.

Q. Was that cleared every day?

A. That is right, sir.

Q. Now did Mr. Meggo give you a count of the cash or did [178] you count the cash?

A. Well, I counted the cash in front of him, sir.

Q. In the morning?

A. In the morning.

Q. What did you do with the cash then?

A. Well, I put it inside the safe, sir.

Q. Did you deposit the cash in the bank?

A. Not before because I am not authorized to sign checks so in order to have expenses I got to keep the cash and pay cash for the expenses.

Q. How long did you operate the business on a cash basis?

A. I cannot remember exactly but you can check it on the bank statements.

Q. Were there ever any deposits made in the bank?

A. Yes, there were.

(Testimony of Ernesto O. Diza.)

Q. How do you know? Who made them?

A. I did, sir.

Q. How often did you make them?

A. Well, the bank book shows it, also how much.

Q. Do you remember?

A. No, I do not remember.

Q. Did you make them once a month?

A. I don't know.

Q. Did you make them once a week?

A. Perhaps two days' in one deposit. [179]

Q. You mean to say that you don't know whether you made them on a regular schedule?

A. Well, as I said the bank deposits show how I deposited the cash.

Q. Do you remember?

A. No, I don't remember exactly.

Q. Did you handle the cash of Pacific Enterprises?

A. That is right, sir.

Q. Did you deposit it the same way?

A. Yes.

Q. Were you also operating the Pacific Enterprises the same way?

A. Well, when there was a receiver we cannot draw any cash from the bank so the only way we got to do is keep the cash for awhile and if we need the cash to pay some money, pay it, sir.

Q. When was the Pacific Enterprises under receivership?

A. Well, I don't know exactly, sir.

Q. Isn't it a fact that they never were?

A. I don't know exactly.

(Testimony of Ernesto O. Diza.)

Q. Mr. Diza, you were an officer of Pacific Enterprises, weren't you? A. I was, sir.

Q. What was your office?

A. In Tamuning, sir. [180]

Q. What is the title of your office?

A. Right now, sir, you mean?

Q. No, during this period of time '52, '53, weren't you an officer of Pacific Enterprises?

A. I was acting as vice president.

Q. And you don't know whether or not the corporation of which you were vice president was in receivership at this time?

A. Well, Mr. Turner was handling all those matters, sir. He was our secretary-treasurer.

Q. You don't remember actually about the banking at all? How many times did you buy bank drafts?

A. Well, I bought if Mr. Thompson—if I ordered mix from Mr. Thompson he would say "Send me money." Then I would buy a bank draft but I don't remember how often it is.

Q. After you had ordered something he told you how much it was going to cost?

A. That is right, sir.

Q. Did you purchase bank drafts without seeing the invoices? A. No, sir.

Q. Did you receive invoices?

A. Yes, sir, shipping documents I received.

Q. From who? A. From Mr. Thompson.

Q. For every time you bought a bank [181] draft? A. That is right, sir.

(Testimony of Ernesto O. Diza.)

Q. Now how often did you mail reports to Mr. Thompson?

A. Well, I sent him once a month a monthly statement.

Q. Did you mail one to him every month?

A. I am not too sure if I mail one every month to him.

Q. Did you ever mail them late?

A. I don't remember. My letter to him shows how often and on what date I sent them to him.

Q. Did you ever receive letters from Mr. Thompson complaining that he was not getting reports on time?

A. I cannot remember that, sir, if he is complaining about the delay of the statement.

Q. What authority did you have down at the Dairy Queen? A. Nothing, sir.

Q. You had no authority down there?

A. Yes, Mr. Siciliano instructed me to keep books and that is all I did.

Q. When did he instruct you to keep the books?

A. Before he left, sir.

Q. When was that?

A. It's a month or two.

Q. What did he tell you about the books?

A. Just to keep records and the books.

Q. You had no authority down there?

A. At the Dairy Queen, no, sir, I don't have any authority [182] at all.

Q. Did you have any authority in Pacific Enterprises? A. Yes, sir.

(Testimony of Ernesto O. Diza.)

Q. What authority did you have there?

A. Well, I am employed there, sir, so I sleep there and eat there.

Q. I don't think you understand what I mean. Did you give any orders at Pacific Enterprises?

A. No, sir.

Q. You could not? Yet you said a few minutes ago that you were vice president.

A. Well, there was the general manager who gave orders.

Q. Who was the general manager?

A. Wally Viet.

Q. What position did Mr. Meggo have?

A. Well, he is assistant manager.

Q. Were they over the officers of the corporation?
A. What is that, sir?

Q. Were they superior to the officer of the corporation?

A. I don't think they are superior but they are the ones in charge of the business.

Q. Did you as an officer of the corporation have any control or authority over Mr. Meggo?

Mr. Bohn: Your Honor, I have not objected to this line of questioning but I think it is [183] immaterial.

The Court: Your objection will be sustained.

Q. (By Mr. Phelan): Did Mr. Viet have any authority down at Dairy Queen?

A. That I don't know also, sir.

Q. How often did you make any reports to Mr. Siciliano?

(Testimony of Ernesto O. Diza.)

A. I didn't make any reports at all, sir.

Q. How often did you get instructions from Mr. Siciliano?

A. He did not give me any instructions—just the daily routine and that is it.

Q. When he left his instructions to you were verbal?

A. That is right, sir. Our daily procedure—that was the only instruction he give to me.

Q. The same procedure that was used in Pacific Enterprises? A. That is right, sir.

Q. Now did you ever take inventories down at Dairy Queen?

A. I am not too sure about that, sir, but the storekeeper took the inventory.

Q. Did you ever verify the inventory?

A. That is right, sir.

Q. How?

A. By checking against the stock cards.

Q. You would check the inventory against the stock cards? A. The stock records.

Q. Now where was the merchandise that belonged to Dairy Queen kept? [184]

A. Pacific Enterprises warehouse, sir.

Q. Was it kept in a separate section of the warehouse?

A. That is right, sir—separate section but just one warehouse.

Q. Was that section screened off in any way?

A. No, sir.

(Testimony of Ernesto O. Diza.)

Q. You posted your books every day?

A. That is right, sir.

Q. All during this period and you then turned them over to Norman Thompson, did you?

A. That is right, sir.

Q. Did you get a receipt for what you turned over?

A. No, sir.

Q. Did you get a record of what was turned over?

A. No, sir.

Q. So you are not in a position to tell us what was in those records?

A. But I know in writing because Dairy Queen is just a part of the organization.

Q. You understood Dairy Queen was part of your organization?

A. No, but that is why I feel like helping the Dairy Queen like when I go there to help the boys clean the floor.

Q. What I am trying to figure out is this: You say you turned over a letter file?

A. That is right, sir. [185]

Q. Do you know what letters were in the file?

A. Correspondence between me and Mr. Thompson.

Q. Are you in a position to tell us how many letters were in the file?

A. No, sir.

The Court: Since the file is in your possession I think you should direct your questions as to any specific letters you have reference to.

Mr. Phelan: I am trying to find out how many letters were turned over. He said he turned over—

(Testimony of Ernesto O. Diza.)

The Court: You know what you have got. If you have any questions about them, bring out what you have and then ask questions.

Mr. Phelan: I know what we have got today. I am trying to find out how he bases the statement that he turned over all the records. He has no receipt.

The Court: This man is a bookkeeper. He is not a student of the science of mnemonics, which is the science of memory. Obviously if you depend upon him to remember everything you would not need him as a bookkeeper. You do not expect any bookkeeper to tell you what is in the books. You expect the books to tell you. You do not expect him to tell you what is in the correspondence file; you expect the file to tell you and you've got it, according to him, so let's stop that line of questioning. It is just wasting the time of the court. [186]

Mr. Phelan: I have no further questions at this time.

Mr. Bohn: Just one clarifying question.

Redirect Examination

By Mr. Bohn:

Q. I thought I understood you to tell the court that your last entry of cash disbursements was in January and your last as to cash income was in April, is that correct? A. That is correct, sir.

Q. So that you did not post the books completely through April 17? A. That is so.

(Testimony of Ernesto O. Diza.)

Examination by the Court

Q. Ernesto, who told you to turn over the books to Mr. Thompson? A. Nothing, sir.

Q. Didn't anybody tell you to turn over the books to Mr. Thompson? Didn't you ask Mr. Turner or Mr. Viet whether you should turn them over?

A. Before Mr. Thompson come here Mr. Thompson told me that his son is going to run the business so I turned over the books to him.

Q. In other words, it was pursuant to Mr. Thompson's instructions that you turned over the books to Mr. Norman Thompson?

A. We turned over everything. [187]

Q. He instructed you to turn over the books?

A. That is right, sir.

Q. What did you turn over? Your cash books, your vouchers, files and everything you had in connection with Dairy Queen?

A. That is correct, sir.

Q. Now prior to the time you turned over the books, was the cash turned in to you each day?

A. That is right.

Q. And that cash was recorded in your cash book? A. That is right, sir.

Q. Who ordered the products for the Dairy Queen?

A. Mr. Meggo ordered through me and I write a letter to Mr. Thompson to send us supplies for Dairy Queen.

(Testimony of Ernesto O. Diza.)

Q. You wrote the letter?

A. That is right.

Q. And Mr. Thompson sent you the invoices?

A. That is right, sir.

Q. And you paid Mr. Thompson for it?

A. That is right, sir.

Q. Sometimes you paid him by checks which he signed? A. That is right, sir.

Q. Was Mr. Siciliano authorized to sign checks also? A. No, sir.

Q. Was Mr. Thompson the only one authorized to sign [188] checks for the local account?

A. I don't know who is authorized or not authorized to sign checks.

Q. But you sent him a made-out check without signature? A. That is right, sir.

Q. And on other occasions you sent him a bank draft? A. Once in awhile, sir.

Q. Why didn't you send him checks all the time? Why did you send checks sometimes and bank drafts other times?

A. The first time we sent him a sight draft.

Q. You opened a checking account afterward?

A. Mr. Thompson and Miss Dorsit opened the bank account. Then Mr. Thompson and Miss Dorsit went to the States so there is nobody authorized to sign checks.

Q. Who paid the gross receipts tax?

A. I do for Dairy Queen.

(Testimony of Ernesto O. Diza.)

Q. You paid the gross receipts tax monthly on the basis of your cash receipts?

A. That is right.

Q. And all of the books and everything else you turned over to Norman Thompson?

A. That is right, yes.

Q. Now there has been testimony here, Ernesto, that Pacific Enterprises or employees of Pacific Enterprises did certain work at the Dairy Queen, that a reefer truck owned by [189] Pacific Enterprises was used by the Dairy Queen, that the Pacific Enterprises furnished out of its stock certain items which were used by Dairy Queen. Now as the book-keeper for both the Dairy Queen and Pacific Enterprises, did you make any payments to Pacific Enterprises for these services? A. No, sir.

Q. Did anyone ever tell you to set up on your books a charge against the Dairy Queen for those things that were furnished?

A. Not until last August, sir.

Q. In other words, from June of 1952, until August of 1954, nothing appeared on your books showing an obligation on the part of the Dairy Queen toward Pacific Enterprises, Inc.?

A. There is some, sir, but not the reefer truck and subsistence and housing facilities.

Q. Those were not? Who told you to put them on then?

A. Mr. Turner instructed me to charge so much housing and subsistence for the Dairy Queen.

Q. But this was after it had been furnished,

(Testimony of Ernesto O. Diza.)

wasn't it? A. Yes, that is right, sir.

Q. Did he tell you to date it back to the time it was furnished? A. That is right, sir.

Q. And to show on your books that it was dated somewhere between June of 1952, and April of 1953? [190] A. That is right, sir.

Q. So that you antedated these entries on your books?

A. Not on the books—we are talking about the housing, isn't that right?

Q. We are talking about the charges of Pacific Enterprises. A. Yes.

Q. So it was last August then that you went back and put these charges on the books of Pacific Enterprises?

A. No, it is not on Pacific Enterprises' books, sir.

Q. Well, you turned over the Dairy Queen books in April of '53? A. Yes, that is right.

Q. So you couldn't have put them on Dairy Queen books?

A. You mean the housing charges?

Q. Housing and reefer truck and supplies and so forth.

A. Well the supplies it's recorded daily, sir.

Q. But the housing, messing facilities and so forth you did not put those on Pacific Enterprises' books until August of 1954?

A. No, it is not on Pacific Enterprises' books.

Q. It isn't there today?

A. It is not there today.

(Testimony of Ernesto O. Diza.)

Q. In other words, as far as Pacific Enterprises, Inc., is concerned you have no charges on your books against Dairy Queen? [191]

A. There is some items, sir, but not subsistence, housing, supplies, and the warehouse—it is not charged against Pacific Enterprises' books.

The Court: Well, I find it extremely difficult to follow this.

Mr. Phelan: I can't figure it out except he said he hasn't got it in the books yet they filed a lawsuit and have their statements attached to it as exhibits to their complaint.

The Court: I am trying to trace down the transactions and according to this witness, the Dairy Queen has never been debited for other than supplies.

Mr. Bohn: May I address the court?

The Court: Please do, yes.

Mr. Bohn: It was not our understanding that the details of that transaction would be taken up in this case but perhaps a word of explanation would clarify the situation. Those items consist, of course, of several different types of services rendered. For example, the item of subsistence for housing the men at the Dairy Queen. They were entitled, in addition to their salary, to subsistence and housing. That subsistence and housing through this entire period was furnished to these men by Pacific Enterprises.

The Court: Well, if you intended to charge for it why didn't you set it up on your books?

(Testimony of Ernesto O. Diza.)

Mr. Bohn: I presume that the reason was because of the [192] close relationship. It was a matter that hadn't gotten settled out yet. I presume it would be a matter of mutual accounting between the parties at this time.

The Court: The parties are Pacific Enterprises, Inc., and the partnership. Pacific Enterprises, Inc., furnished services or supplies or something of value to the partnership. It seems to me that proper bookkeeping contemplated that a charge would have been made and payments made currently since you always showed a profit.

Mr. Bohn: I think it is impossible to disagree with that suggestion of the Court. I think proper bookkeeping on those items would and should be kept current. In mitigation I point out to the Court that here is a situation where there is an extremely close relationship between the owners of the Dairy Queen and Pacific Enterprises; that in my own view I respectfully suggest to the Court that it probably would have been more reprehensible for these to have been paid weekly or monthly because of the possible statement there was an adverse interest and various items had not been thoroughly agreed upon, for example the subsistence.

The Court: Mr. Bohn, don't you agree if you furnish and rely upon a profit and loss statement and you have a hidden charge then that statement does not reflect the true situation between the parties?

Mr. Bohn: I must concede that to be the case in

(Testimony of Ernesto O. Diza.)

the [193] absence of adjustments and mutual agreements at a later date.

The Court: In the absence of mutual agreements at a later date?

Mr. Bohn: Right.

The Court: You have heard the testimony here, for instance, that income taxes were paid on the basis of the amount shown as having been earned profit. Obviously if you have expenditures which are properly chargeable to the business, a serious matter would be raised for the simple reason that you would be paying more tax than was indicated by your true profit.

Mr. Phelan: If it please the Court, if I am not mistaken, Mr. Diza said that some of these items don't show on Pacific Enterprises' books even today.

The Court: That is my understanding. There is nothing set up on the books of the corporation for indebtedness except certain items of supplies. Items such as housing and the furnishing of a reefer truck today do not appear on the books.

Mr. Phelan: It would appear that they were an afterthought after the lawsuit was filed.

The Court: Well, our time is drawing to a close this evening and it isn't germane particularly to this action except, of course, we have to know how these transactions between the parties were handled in order to evaluate the type of service which Mr. Siciliano rendered in the way of management. If he did more than he was supposed to do we want to

(Testimony of Ernesto O. Diza.)

know that, but [194] I must confess that I find it a bit unusual for a large operation of that kind not to carry upon its books as an obligation due any amounts that he expected to claim as obligations due. Otherwise it distorts your profit and loss picture, I would think, materially.

Mr. Bohn: Well, I cannot successfully disagree with the Court on that point.

The Court: Yes, now are we through with this witness?

Mr. Bohn: I am, your Honor.

The Court: Are you through with him?

Mr. Phelan: Yes. I would like to know if there is any possibility of having this witness or somebody else bring in supporting vouchers for these things that don't show up on the books? I don't think it is necessary to go any further than Mr. Thompson's satisfaction with what he has received. I am talking about this subsistence, etc.

The Court: Well, of course, I realize that it isn't particularly germane to this particular case, but naturally since so much depended upon the method of bookkeeping, the Court made inquiry as to the inter-relationship because you have a corporation debtor, a corporation creditor, both books being kept by the same person. Obviously a very high standard of performance is required. This witness will be excused and the court will stand adjourned or recessed until 9:30 tomorrow morning.

(The court recessed at 5:05 p.m., February 14, 1955.) [195]

Tuesday, February 15, 1955, 9:30 A.M.

The Court: Call your next witness.

Mr. Bohn: I beg your Honor's pardon. May I at this time address an inquiry to the Court as to the suggestion of the Court as to when the second case should be presented to you?

The Court: Oh, I don't believe that we are dealing with the second case at the present time. The pretrial order in connection with the Pacific Enterprises' case merely states that any evidence which is introduced in this case and which is material to the second case should be considered in connection with the second case without having to be reintroduced. Now what we are trying here, of course, is the *Siciliano vs. American Pacific Dairy Products, Inc.*, case and that involves, of course, as you know, the question as to whether the contract continues in existence and so forth and the basis for any accounting between the partners if that is true, so specifically I don't think you are required to present any testimony in connection with *Pacific Enterprises, Inc., vs. American Pacific Dairy Products* except as it bears upon the fulfillment of the partnership obligation by Mr. Siciliano.

Mr. Bohn: Well, Mr. Phelan has asked me the question as to when I should be prepared to start on *Pacific Enterprises*—at the conclusion of this case or some future time.

The Court: At the conclusion of this case. I think the pretrial order makes it abundantly clear that these are consolidated solely for the purpose

of utilizing the relevant testimony. [198] The pre-trial order states the action is consolidated for purposes of a trial with 59-54 and anything pertinent in the present action shall be considered as having been introduced in 68-54.

Mr. Phelan: The reason for the question, your Honor, was that it was my understanding, I believe it was a previous suggestion by the Court, that in the event it should be found an accounting is necessary in the first action, it should become a part of the second action at the time of trial.

The Court: Until it should be determined what the situation is as regards this case, we are in no position to determine the obligations of the partnership to Pacific Enterprises.

Mr. Bohn: That was my understanding of your Honor's order. I would like permission at this time, if your Honor please, to recall Mr. Henry Diza for one purpose and one purpose only and that is to correct an error in his testimony in response to a question of the Court.

The Court: Very well.

Mr. Bohn: Mr. Diza.

The Court: This witness has already been sworn.

MR. HENRY DIZA

previously called as a witness by the plaintiff, was recalled by the plaintiff and, having been previously sworn, testified as follows: [199]

Reredirect Examination

By Mr. Bohn:

Q. In response to a question of the Court yesterday you stated you had not prepared and forwarded a bill or a list of obligations due Pacific Enterprises until August of '54. Do you desire to correct that statement at this time?

A. Yes, I submitted that statement August, '53, to Mr. Turner.

Q. August, 1953? A. Right, sir.

Q. It was not August, '54, but August, '53, is that correct? A. Yes, sir.

Mr. Bohn: I have no further questions.

Recross-Examination

By Mr. Phelan:

Q. Yesterday on the stand did you not tell the judge that as of yesterday you had not posted that to the books of Pacific Enterprises?

A. That is right; it is not posted.

Q. Have you got supporting vouchers in your files to support that statement?

A. Well the subsistence is only the estimated cost.

Q. Have you got vouchers for anything else?

A. We have supporting papers on materials we used on the addition to the building. [200]

(Testimony of Ernesto O. Diza.)

Q. What building are you referring to?

A. The addition—the extension.

Q. That was built with Pacific Enterprises' funds?

A. That is right, sir.

Q. When was that built?

A. Oh, 1952, sir.

Q. You were handling the funds of Dairy Queen at that time?

A. That is right, sir.

Q. Was money in the bank at that time?

A. I think so, sir.

Q. You had cash in the safe?

A. That is right.

Mr. Phelan: I have no further questions.

Mr. Bohn: I have no further questions of this witness, your Honor.

The Court: Very well. You may step down.

Mr. Bohn: That constitutes the plaintiff's case, your Honor. We rest at this time.

Mr. Phelan: May it please the Court, I move that the complaint be dismissed on the grounds that the plaintiff has failed to prove that he complied with the terms of the contract. He was gone for two years. The contract called for his management. He was the general agent for the partnership. He got on an airplane and left a week after the business opened and did [201] not return for two years. He took no active part in the management of the business. He left that to the employees of a corporation, not a party to the contract, who happened to be on Guam, and I think the partnership agreement and other testimony is plain as it shows that his ability and his skill were part of the consideration.

The Court: What is your view, Mr. Phelan, as to your obligation to Mr. Siciliano? What do you owe?

Mr. Phelan: Whatever an accounting would show.

The Court: An accounting as of when?

Mr. Phelan: We contend that Mr. Siciliano repudiated that contract when he left, but the corporation went to great lengths to try to get him back. They wanted his services. They leaned over backward.

The Court: There is no evidence before me to that effect.

Mr. Phelan: Not as yet; I think you are right. His repudiation of the contract meant they had to return his money to him less any damages he might owe based on an accounting for that period.

The Court: Now it seems to be admitted—on a motion of this kind, of course, the Court must look on the plaintiff's testimony in its most favorable light. It seems to be admitted that from June of 1952, until April of 1953, the following services were performed which were beneficial to the partnership: First, employees were provided. Secondly, warehousing for all [202] materials was provided. Thirdly, an extension to the building was constructed. Fourthly, a reefer truck was made available to carry the surplus mix when business was so great that the machines could not keep up currently; that there was constant supervision provided; that there was bookkeeping provided, and that the net result of all these was that the business

made a much larger profit while it was being handled on that basis than it made when it was being handled by the American Pacific Dairy Products.

Mr. Phelan: Yes, but where was Mr. Siciliano's personal supervision?

The Court: If this contract means that he is entitled to a salary only while he is employed, then if there is dissatisfaction the contract itself provides how the partnership shall be terminated.

Mr. Phelan: Yes, but——

The Court: Now we have no evidence here that you have done more than to accept the full benefits, took the profits and invested them elsewhere without the consent of Mr. Siciliano, and as you have ignored him completely——

Mr. Phelan: If the Court please——

The Court: When obviously you must have known where he was since you have just stated you attempted to get him back.

Mr. Phelan: Yes, but if a contract is entered into and ratified there are provisions for rescission, but if a contract [203] is repudiated by the other party, the non-repudiating party doesn't have to follow the terms.

The Court: Mr. Phelan, how can you construe repudiation when all the services of management were performed except they weren't performed by Mr. Siciliano but were performed by a corporation which he headed and of which the testimony shows he was the principal stockholder?

Mr. Phelan: The contract was not with that

corporation but it called for Mr. Siciliano to supervise.

The Court: Then why did you accept the services?

Mr. Phelan: Well, if the Court please, there was almost \$50,000 invested. Something had to be done. You just don't leave it.

The Court: Guam is available by flight in two days. The testimony is that Mr. Siciliano left the first part of July, 1952. He testified that when he got to the States he telephoned and advised them that he would be gone, he said, for about two months but in the meantime everything would run all right. There was no repudiation on his part. The fact that you say "We tried to get him to come back" indicates that you did not consider it a repudiation.

Mr. Phelan: At that time, no.

The Court: That agreement was actually operative, at least until you took over.

Mr. Phelan: Well, I contend I think it shows good faith. [204] Siciliano got a problem. He went to the States. We tried to get him back—OK—it takes him months to decide he wasn't coming back.

The Court: I agree with you as to the good faith. I think one of the interesting things about this case here is that all of the witnesses who have testified appear to have testified with the utmost honesty and frankness and both the bad and the good things were brought out. Your witness has clearly testified that he thinks they were dealt honestly with. He

testified that he considered Mr. Siciliano one of the ablest men that he had ever known.

Mr. Phelan: That is why they wanted him.

The Court: He testified that he accepts the reports that were made to him as being valid and being about as good as could be done in the circumstances. The only odd thing that the Court finds is that the Dairy Queen starts to lose money just as quickly as this lawsuit is filed. The Dairy Queen made money every month until September, 1954, and then you show a loss and you show a loss since then.

Mr. Phelan: Most every business on Guam is not doing the business it did a year ago either.

The Court: Well, it is coincidence possibly but it is a strange coincidence and obviously the question presents itself as to whether money is being diverted from the profits of the Dairy Queen for the operation of the corporation which is under [205] joint management. I think very clearly that the plaintiff has made out a prima facie case. Now as to when the cut-off date is for purposes of accounting, I don't know, but the plaintiff has certainly shown that you have his money, that you took his services, that those services resulted in a greater profit than you made when it was under your sole management, and that at no time have you made a legal tender or have you followed the contract as to how it should be accounted for in any other way. If there has been arbitrary action, according to the testimony, so far that arbitrary action is on the part of the defendant, not on the part of the plaintiff.

Mr. Phelan: I don't think it is arbitrary to tell a man who is 6 or 7,000 miles away from where he has agreed to be, "We can't ratify it. We will give your money back." Mr. Siciliano knew he was dealing with the corporation.

The Court: Now, if you notice paragraph 7 of this contract, it simply says, "During the period that he shall act as manager of the co-partnership."

Mr. Phelan: Yes.

The Court: It doesn't say during all the time.

Mr. Phelan: Neither does it provide he shall act for seven days.

The Court: It merely provided for his salary during that time and "in the event either party should desire to retire from the partnership, he shall give the other party written notice of his intention so to do and the remaining partner shall have an [206] option for the ninety days next ensuing the receipt of such notice to elect to buy out said retiring partner and acquire sole ownership of the business of Dairy Queen of Guam in the following manner," which you set forth.

Mr. Phelan: Yes, that was the tentative contract that was entered into——

The Court: There is no evidence before the Court at this time that there is anything tentative about the contract. It is fully executed and supported by the assignment of a lease and registration of authority to do business under a fictitious name. You are not in the tentative field then. You are a going business.

Mr. Phelan: The cases I have read, your Honor,

Mr. Phelan: ... the partnership was never ... the corporation, it was ... abandoned by Mr. ... and that the terms of the agreement ... are not binding.

The Court: Well, Mr. Phelan, you have a peculiar theory of abandonment. Where did your money come from? Where did your profits come from?

Mr. Phelan: I don't know.

The Court: Certainly not from an idle operation.

Mr. Phelan: That is true. [219]

The Court: Who ordered the materials? Who furnished the materials? Who furnished the reports? Who furnished the ...
It was ...
No ...
... but it was done by ... of the corporation ... to the testimony ... Proceed. Your ...

Mr. Phelan: ...
Mr. Thompson: ...
Mr. Thompson: ...

... Joseph A. ...
MR. EDWARD THOMPSON
... called as an adverse
... called as a witness
... been previously sworn to
Direct Examination

Mr. Phelan: ...
And you are Mr. Thompson's ...
... testified ...

Mr. Thompson: ...
... questions about Mr. ...
... I believe it was ...
... Dairy Products, Inc?

You had some ...
... in 1951! [219]

Yes, I saw him ...
He was appointed ...

After I was born in ...
... appointed next ...

Did these ...
No, Mr. ...
May 12, 1961. He ...

... didn't agree to sweep what ...
... and we offered ...
... we thought he should ...

At that time the idea ...
... in the corporation?

Yes, we offered ...
... of the stock is ...
... it over and that didn't ...

MR. EDWARD THOMPSON

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Direct Examination

Mr. Phelan:

And you are Mr. Edward Thompson who
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Mr. Thompson, yesterday you were asked a
questions about Mr. Siciliano being the agent
Guam—I believe it was in 1951—of American
tic Dairy Products, Inc? A. Yes, sir.

You had some negotiations with Mr. Si-
in 1951? [210]

Yes, I saw him in '51 on Guam.

He was appointed agent of the corporation

fter I was here on Guam in February, '51,
ppointed agent, yes.

nd those negotiations work out?

, Mr. Siciliano called them off in his letter
2, 1951. He called them off because he
agree to accept what we had to offer. He
more and we offered less. He wanted more
thought he should have and more than we

at that time the idea was that he should buy
the corporation?

es, we offered him a chance to buy up to 20
of the stock in the corporation and he
it over and that didn't appeal to him.

say that a party seeking to bind a corporation, the burden is on him to show his authority.

The Court: I think he has shown that whether it was a partnership or a joint venture nowhere here do we find any evidence that the corporation is not still willing to be bound by the agreement entered into. You have no evidence that it was ever repudiated.

Mr. Phelan: I don't think he has any evidence in to show that the corporation ever authorized his signature.

The Court: You have got the fact that the president of the corporation executed the contract. You have got the fact that the corporation made income tax returns. You have got the [207] fact that these matters were all of public record, public knowledge, and the fact that the corporation took the profits and now have them invested.

Mr. Phelan: Not as a partnership. Someone had to prepare the tax returns and they were not partnership tax returns.

The Court: Yes, you took the money.

Mr. Phelan: We admitted we took the money; we admit that.

The Court: And you have given nothing back. You mean to say you expect the Court to say you can keep a man's money, take his service—you can make a profit out of it and then you can kick him in the teeth just as soon as you feel that the thing is profit-making now and on its feet? You mean to say that for one moment if this thing had lost

money that Mr. Siciliano would have gotten his \$15,000 back?

Mr. Phelan: Since it didn't I don't know.

The Court: Every nickel that you had—your paid-up capital was in this store. You were broke.

Mr. Phelan: That is not so, your Honor.

The Court: Well, that was the testimony—that unless you called upon the stockholders for additional capital contributions you had no surplus.

Mr. Phelan: True, but when this thing went into operation there was an additional \$15,000 in there.

The Court: There was \$38,000.

Mr. Phelan: There was more than that. [208]

The Court: Well, \$8,000, I think, has to be paid back out of profits and each side puts in \$15,000. Otherwise you are in no position, in the Court's view, to come into Court and say, under the testimony which has been introduced—what your defense may be, I don't know—but to say after you have received the money, after you have received these services, after you have taken the profits, after you have invested them in another corporation and so forth, that you have no obligation whatever.

Mr. Phelan: I haven't said that. We have always been ready to refund his money.

The Court: But the Court has no evidence before it that you have ever done anything affirmatively at all. You have not followed the agreement as to the winding up of the partnership voluntarily nor have you ever made a legal tender of the amounts due to the defendant.

Mr. Phelan: Our contention is since the partnership was never ratified by the corporation, it was in effect abandoned by Mr. Siciliano, and that the terms of the agreement for winding up are not binding.

The Court: Well, Mr. Phelan, you have a peculiar theory of abandonment. Where did your money come from? Where did your profits come from?

Mr. Phelan: I don't know.

The Court: Certainly not from an idle operation.

Mr. Phelan: That is true. [209]

The Court: Who ordered the materials? Who served the ice cream? Who furnished the reefer? Who furnished the supervision? Who furnished the bookkeeping? Who made the reports?

Mr. Phelan: It wasn't Mr. Siciliano.

The Court: Not individually but it was done and it was done by the employees of the corporation which he headed, which according to the testimony, was interchangeable with him. Proceed. Your motion is denied.

Mr. Phelan: Mr. Thompson. You have been previously sworn, Mr. Thompson?

Mr. Thompson: Yes.

MR. EDWARD THOMPSON

previously called as an adverse witness by the plaintiff, was called as a witness for the defendant and having been previously sworn, testified as follows:

Direct Examination

By Mr. Phelan:

Q. And you are Mr. Edward Thompson who previously testified? A. That is right.

Q. Mr. Thompson, yesterday you were asked a few questions about Mr. Siciliano being the agent on Guam—I believe it was in 1951—of American Pacific Dairy Products, Inc? A. Yes, sir.

Q. You had some negotiations with Mr. Siciliano in 1951? [210]

A. Yes, I saw him in '51 on Guam.

Q. He was appointed agent of the corporation here?

A. After I was here on Guam in February, '51, he was appointed agent, yes.

Q. Did those negotiations work out?

A. No, Mr. Siciliano called them off in his letter of May 12, 1951. He called them off because he couldn't agree to accept what we had to offer. He wanted more and we offered less. He wanted more than we thought he should have and more than we offered.

Q. At that time the idea was that he should buy stock in the corporation?

A. Yes, we offered him a chance to buy up to 20 per cent of the stock in the corporation and he thought it over and that didn't appeal to him.

(Testimony of Edward Thompson.)

Q. As an agent, then, he was terminated?

A. No, we didn't terminate that until I got over here in July. I mean terminate officially. No, we didn't do anything about it until July. In fact, I didn't know he actually filed that appointment with the Government of Guam because in his letter of April 7, he said, "I am holding all the papers you sent me."

Q. Then Mr. Slaughter was your next agent here?

A. Yes, Mr. Slaughter leased the land, entered into a contract for the construction of the building and was the manager [211] until I got here in June.

Q. That was June, '52? A. June, '52, yes.

Q. Now, when in June, '52, did you commence negotiating with Mr. Siciliano?

A. When I got here in June, Mr. Slaughter told me he was going to Ethiopia, and I saw Mr. Siciliano when I got here because he and I were friendly, and I don't know when we began negotiations—June 15, 16, or 17.

Q. Was that when you got to Guam?

A. No, I got to Guam the 10th of June, '52, approximately.

Q. When you got to Guam, what was the condition of the building?

A. The building was completed. The roof wasn't entirely satisfactory. There was a door on the inside that had to be put in. Slaughter thought it wasn't necessary but Tony Lujan, the contractor, put it in because it was shown on the blueprints,

(Testimony of Edward Thompson.)

and some of the painting on one side of the building looked like it had been put on with too thin paint, and that was corrected.

Q. Do you know who corrected that?

A. Tony Lujan of Overseas Construction.

Q. They had the contract?

A. They had the contract, yes.

Q. When were the machines installed? [212]

A. The machines were installed the first week I got here. Actually, a man named Griffith Thomas and an electrician did the installing. All I did was say, "do this," and "do that."

Q. When did Slaughter terminate his connection with this business?

A. I think we paid him up to the end of June. I don't know. He said he was going to Ethiopia, but he did help us. He had a crew. We had five men we used to open boxes and clean up the store, put the goods on the shelf and things like that, so I would say he was actually active until the 21st, maybe the 20th—I don't know—June, '52.

Q. Now, on the day the store opened for business, was there any remaining construction to be accomplished?

A. Well, we didn't know at that time there was a septic tank to be put in later.

Q. Was Overseas Construction supposed to do that?

A. Slaughter was off Guam and didn't check. They were supposed to, I think. They put in an oil

(Testimony of Edward Thompson.)

drum instead of a septic tank—just something to get by.

Q. When did you commence discussing the terms of the partnership agreement with Mr. Siciliano?

A. Well, I had written him early in June and asked him if he was still interested in the deal and he wrote back that he was, but the actual verbal discussions occurred just shortly before we opened the store. We had to have a manager. I was [213] busy getting the equipment lined up so I couldn't spend much time talking to him, but I would say about the 18th or 19th we started talking—I mean definitely getting down to cases.

Q. Now, at the time you entered into this agreement with Mr. Siciliano, what did the Dairy Queen owe?

A. They owed \$5,000 — \$5,038 — something like that on the building contract. All the supplies that were on the island or in transit had been paid for.

Q. Now, when did the crew that Mr. Slaughter hired cease working down there?

A. On the 21st of June.

Q. Were they paid off—laid off?

A. They were paid off and laid off, yes.

Q. And you opened on the 22d?

A. We opened on the 22d, yes.

Q. Now, you left shortly after the 22d?

A. I left on the 24th.

Q. You left on the 24th for the States? Before you came to Guam, I take it your supplies came in by ship?

A. Yes.

(Testimony of Edward Thompson.)

Q. Before you left to come to Guam, you had ordered the initial stock? A. I had, yes.

Q. Had it arrived here before you came?

A. Yes, all of it was here. [214]

Q. Now when did you first test the machines?

A. We tested the machines on the morning of the 22d. We were very anxious to get open so we opened that afternoon.

Q. What did that test consist of?

A. The test consisted of running mix through them to see that the machines were functioning properly and also to get the grease and maybe particles of steel that was in the machine out of the machine. The mix would carry all that out. The mix would be dark gray principally from grease that was left in the machine by the manufacturer.

Q. And you opened that afternoon?

A. Yes, June 22, 1952.

Q. Did you open a bank account?

A. We did. We opened that the day before or perhaps the 20th. I think we opened that the afternoon of the 20th.

Q. And who were authorized to sign checks from that bank account?

A. I understood I was and Mr. Siciliano. At that time I thought she was Madeline Siciliano but she was authorized also.

Q. Now with your additional supplies in there, your mix and supplies, etc., how were they ordered?

A. Well, they would send me an order telling me what they needed. I would write the manufacturers

(Testimony of Edward Thompson.)

or telephone the manufacturers and arrange for them to ship them. They would ship them and I would pay the invoices and send them over to Guam and [215] say "You owe me so much money," and they would send a check. Later on they provided me with a trust fund which I accounted for.

Q. Now you received seven or eight checks from Guam drawn on that account?

A. I don't remember the number but I received checks, yes.

Q. And you received some drafts from Guam?

A. Yes.

Q. What did you do with those documents?

A. With that money?

Q. Yes.

A. I put it in the bank. It was either to reimburse me for bills I paid—usually I paid them because they were in transit and we discounted all bills—or to pay bills in the future.

Q. Did you use your personal funds in paying these bills?

A. Most of the time I did. It was easier to do that than to use company funds and countersign the check.

Q. Did the company ever use their funds to pay these bills? A. Some of the time, yes.

Q. Some of the checks were to the corporation, made payable to the corporation? A. Yes.

Q. The original deal was the corporation was to get [216] \$15,000?

(Testimony of Edward Thompson.)

A. The original deal was that the corporation was to get \$15,000, yes.

Q. Do you recall how that \$15,000 was paid to the corporation and where it was paid?

A. Well, on the afternoon of June 20th after I made Siciliano a definite offer, Siciliano and Madeline Dorsit said that sounded all right, so one or the other of them drew—I have forgotten which one—drew two checks for \$7,500 each. One check I took with me back to the States. The other check Joe Siciliano and I took down to the Bank of America and opened a bank account under the name of Dairy Queen.

Q. Both checks were from Mr. Siciliano?

A. Yes.

Q. Half was left here in the business?

A. As a loan by the corporation, yes.

Q. And half went back to the corporation?

A. Yes.

Q. Now that was money due to the corporation at that time? A. Oh, yes.

Q. Now any other checks or drafts payable to the corporation in the States, what was done with them?

A. Well, Dairy Queen of Guam paid back that \$7,500 some time in October and that was deposited in the company's bank account because it belonged to the company. All the other [217] money we used to pay bills.

Q. Let me go into this for a moment. An invoice or a bill would come in from a supplier?

(Testimony of Edward Thompson.)

A. That is right.

Q. The merchandise would be shipped to Guam?

A. That is right.

Q. The company in the States or you would pay the vendor of that merchandise?

A. Mix, especially, was cash on the barrelhead. We paid for mix in advance.

Q. You paid things in advance and if you used your own funds you would be reimbursed?

A. That is right. I got all my money back.

Q. Now the money would come from Guam—a \$1,000 would come from Guam?

A. That is right.

Q. What records did you keep? What did you do with the invoices?

A. Well, originally in all cases, rather, as soon as I received the invoices I paid them and mailed them to Guam. Shipping documents if they came at the same time I mailed those to Guam. If they came a day or two later, they go as soon as they are received. I just mailed the original. I kept the duplicates to cut down on postage. Then in the beginning I would write Henry Diza and say—list the bills—and say “I paid [218] these bills” and ask him to send me a check. Henry would reply, sending me a bank draft or whatever it may be and that would wipe out that transaction. But that was a little slow. I was not only out this 2 or \$3,000 but 2 or \$3,000 more so Henry and I agreed he would furnish me a working fund of 6 or \$7,000 and I would account for it at regular intervals. Usually I would

(Testimony of Edward Thompson.)

account for it twice a month but as soon as it got smoothed down I would account for it just once a month. I have it over there if you want to introduce it.

Q. You sent a copy of every invoice to Diza?

A. Oh, yes, every copy.

Q. Did you have a duplicate copy?

A. Yes, I kept a duplicate in Seattle.

Q. Outside of the \$15,000 that went to the corporation do you know whether any money in excess of the amount of invoices plus rental charges was ever received by you or the corporation?

A. Of course, we used some money to invest in that Guam Frozen Products.

Q. I mean going back to the States.

A. Oh, no, none of that money there.

Q. Then all the money that was ever transmitted to the States was accounted for in invoices and bills?

A. There was no diversion of funds.

Q. I mean Mr. Diza received supporting vouchers accounting [219] for every cent and the corporation has a copy of that in their files in Seattle?

A. That is right, yes.

Q. So that the only money that went to the States outside of \$15,000 was in payment of bills and expenses in connection with the business?

A. Yes, sir. No money was to pay salaries or anything like that.

Q. Now did you receive a salary from the corporation?

A. No, sir.

Q. Did you receive a salary from Dairy Queen?

(Testimony of Edward Thompson.)

A. Oh, I didn't receive a salary from either business, no.

Q. Have any of the stockholders ever received any dividends? A. No, sir.

Q. Have any of the officers or directors ever received any salaries or fees?

A. We agreed not to pay salaries or fees. There might be an exception. Mr. Little is secretary and attorney for the company. He might have received fees. His firm drafted the articles of incorporation and acted as our attorneys. I think they made a charge on the income tax, something like that.

Q. Now you were supposed to receive reports from Diza or from Mr. Siciliano and what types of reports did you receive?

A. I was supposed to receive the reports. I eventually [220] did get a profit and loss statement and financial statement. They were slow in coming and not regular. In fact I didn't receive any reports until some time in September because they were having trouble in setting up the books. Mrs. Matson who was supposed to supervise that was away from the island. I think she was in Bangkok or somewhere.

Q. Did you endeavor to get these reports?

A. Oh, I wrote about it, complained about it, yes.

Q. Who did you write to?

A. I wrote to Diza first, then I wrote to Lyle Turner and it was Lyle Turner who wrote me and I started getting them in September.

(Testimony of Edward Thompson.)

Q. You started getting them in September?

A. I got the reports for June and July, yes.

Q. When did you next get reports?

A. I don't remember.

Q. Did you get them systematically?

A. We got them. There would be delays and I would write and ask them about them. The delays were due to Henry being overworked. He speaks English better than he writes it and it is difficult for him to write in English.

Q. Did you receive letters from Henry Diza?

A. Yes.

Q. Did you receive letters from Mr. Meggo?

A. No, sir. I never heard from Meggo, never got a cable [221] from Meggo, never wrote to Meggo, and it was not until January when I was out here that I ever knew Meggo had any connection with the business. January 2 I wrote to Siciliano in Las Vegas that it seems that Meggo is in charge and he doesn't seem to be doing a very good job of it.

The Court: When was that?

A. January, '53, and that was the first information I had Meggo was supervising the work.

Q. Did Mr. Viet ever write to you?

A. No, I talked to him on the phone one day. I wanted to talk to Madeline and Viet said that Madeline was sick in bed and he didn't know enough about the business to help me any, but I gave him some messages for her.

Q. Now, Mr. Thompson, did the corporation

(Testimony of Edward Thompson.)

make any attempt to persuade Mr. Siciliano to return to Guam?

A. Will you raise your voice, Mr. Phelan?

Q. I am sorry. Did the corporation make any attempt to persuade Mr. Siciliano to return to Guam?

A. Yes, we kept after him constantly. Mr. Siciliano is mistaken when he said he phoned me and told me about his troubles. He phoned me at 3 a.m. I asked him what he was doing, getting me out of bed. I wasn't angry but I wanted to know why he wasn't running the store. He said he had to come over to do some buying and he said he was going to be there ten days, and it was in August that I heard he was having marital [222] troubles. I heard some bad news about it and I hoped it would be cleared up shortly.

Mr. Bohn: I suggest that these latter statements are not responsive to the question.

The Court: Well, the question was as to whether he attempted to get Mr. Siciliano to return. Now he is just describing——

A. Sometime in October the board of directors had a meeting. Some of the people were more disturbed than others over the failure of Joe to return in 1952. We all wanted him back, so we passed a resolution in connection with this partnership agreement. They passed a resolution approving the partnership agreement if Mr. Siciliano returned to Guam within 60 days of the date of that resolution, and I think I wrote a letter to Lyle Turner or to

(Testimony of Edward Thompson.)

Joe saying that if the 60 days specified in the resolution was too tough and if Lyle Turner could assure me Joe could get back there in 90 or even 120 days, I felt sure I could get the board of directors to agree to the change in the time limitation.

The Court: May I interrupt at this time. Mr. Thompson, when did you first put before the board of directors the fact that you had entered into this contract?

A. I left Guam on June 24, 1952. Joe and I had signed the contract but there was some typographical changes to be made by Mr. Turner. We signed them on the 23d and I left the next morning at 7 o'clock. Mr. Turner said "I have got to make these [223] corrections, but I will get them out to you on the next plane." They didn't come and it was not until after the 16th of July that I got those papers from Mr. Turner so I did not call a board of directors meeting until after the 16th of July.

The Court: Were the contracts signed here?

A. Yes.

The Court: I am not following you. If the contracts were signed, what typographical errors were involved?

A. I don't remember, sir. Maybe one word had to be changed, an omission. In other words, I didn't leave with the contracts. Mr. Turner was to mail them to me.

The Court: But the contracts had been executed?

(Testimony of Edward Thompson.)

A. The contracts had been executed by me and Mr. Siciliano, but Mr. Turner held up the contracts for some reason or other and they didn't reach me for about a month or six weeks. I got them about the 17th of July, I would say, so I couldn't call a meeting of the board of directors to pass on some papers which were not in my possession, so it was some time in August before we got the board to meet. By that time we had learned of Joe Siciliano's troubles. I explained the trouble and said Joe will probably get back in a few weeks. They said "What shall we do about it?" I suggested we hold it up a few weeks and do nothing and we did and then in October we had this formal resolution, which we mentioned.

The Court: As I understand, there was a board meeting in [224] August and at that time they had an opportunity to approve the contract?

A. Yes and because of Mr. Siciliano's absence, they decided to hold it up.

Q. (By Mr. Phelan): Did you act for Dairy Queen of Guam in the States as their purchasing agent or what capacity?

A. I was the purchasing agent. That is all that I did, yes.

Q. You placed orders and saw to the paper work?

A. Yes, saw they got on board ship—that sort of thing—paid the bills and sent all the documents to Guam.

Q. I take it that for some time now the Dairy

(Testimony of Edward Thompson.)

Queen has not owed you any money for advances, that is all cleared up?

A. Occasionally they owe me a few hundred dollars because sometimes I pay more than I have on hand, but they pay it back.

Q. Is that money kept separate from the corporate funds of American Pacific Dairy Products?

A. I don't use the corporate funds at all any more. I just paid them personally.

Q. You paid them yourself—advanced the cash and got it back? A. Yes.

Q. Now, Mr. Thompson, have you got the bank statements and bank book of this Dairy Queen account on Guam?

A. They are in that brief case there. [225]

Q. Do you recall—can you identify them?

A. If you pass the brief case. I also have the deposit books; the deposits shown on the bank statement, which would agree. The first deposit was June 20, 1952, \$7,500; that is the one.

Mr. Phelan: I don't want to offer them into evidence and have to copy the bank statements and stuff like that, but there are only a few deposits. I would like to read the deposits and dates into the record.

A. There are not very many of them.

The Court: Well, now these are the deposits made in the name of Dairy Queen?

Mr. Phelan: Starting at the time this contract was entered into through May 29, 1953, when he quit depositing under the Dairy Queen of Guam.

(Testimony of Edward Thompson.)

The Court: Now it is understood that \$7,500 was capital?

A. As a loan.

Mr. Phelan: That was left for operating capital, loaned to the partnership. It wasn't excess capital after a partner put in his capital consideration.

A. You want me to read them?

Mr. Bohn: I have no objection.

Mr. Phelan: Please.

A. All right. This is 1952. The first one as I said before was June 20 and was \$7,500; June 30, \$1,289.85; July 2, [226] \$1,516.80; July 19, \$36.80; the 14th, \$2,530.15; the 22d, \$3,934.50. There were no deposits made from July 22 until September 18 when \$426 was deposited. On September 25, \$361. On the same day, \$1,663. There were no deposits in October or November. In December the deposit was \$4,268.50. On December 30, the deposits were \$4,000. January 19, 1953, \$1,000. The same date, \$2,000; the 20th, \$1,959. February 3, \$1,000; March 11, \$2,147; March 12, \$4,000; March 25, \$2,841; April 13, \$2,000; April 24, \$1,195. That was the first deposit my son made. April 27, \$6,669; April 29, \$1,665; May 3, \$839; May 29, \$339.65. There were no deposits after that to this account.

Q. (By Mr. Phelan): After what date were the deposits made by Norman Thompson?

A. Beginning with that April 24, 1953, deposit.

Q. Mr. Thompson, have you got the cancelled checks of that account?

A. Of that account, yes.

(Testimony of Edward Thompson.)

Q. Would you read the dates and amounts of those checks?

A. Well, the first date is—let's see—I don't have check No. 1. Check No. 1 was \$5,038.57 and payable to the Overseas Construction Company. Here it is. I didn't get it out when I got the rest of them. Shall I read the rest of them?

Q. Please.

A. June 27, 1952, Check No. 2 was paid to the Government of Guam for \$496.18. On June 28, Check No. 3, \$1,118. That was [227] for extras on the Overseas Construction Company contract. On July 1, \$555 payable to Getz Brothers. On July 2, \$58.76, payable to General Transfer Company for hauling supplies. July 4, cash \$77.10. All of these checks except the first one were signed by Madeline Dorsit. The first one was signed by Joe Siciliano. July 10, \$105 to Guam Daily News, signed by Madeline Dorsit. July 15, Check No. 8, \$60.13, signed Madeline Dorsit, payable to the Treasurer of Guam. There were no checks 9 and 10 as they were canceled for some reason; I don't know. Check No. 12, October 2, \$7,500, payable to—this is in payment of that loan and signed by me. I think all the checks after that were signed by me. November 17, payable to Edward Thompson, \$4,295.50, in payment, it says here, for 44 drums of mix. Check No. 14, December 1, \$32.40—it doesn't say what it covers. Check No. 15, December 8, \$4,700 payable to American Pacific Dairy Products. Check No. 16, \$537.76, payable to

(Testimony of Edward Thompson.)

Edward Thompson. Check No. 17, \$1,200, dated January 3, 1953, payable to Edward Thompson. Check No. 18, February 2, \$5,000, payable to Edward Thompson. Check No. 19, March 23, \$8,000. Check No. 19 was paid to Edward Thompson. Check No. 20, Edward Thompson, \$10,000. Check No. 21—that last check was April 30—June 22, payable to Edward Thompson, \$6,000. And here is an unnumbered check but dated. It's for \$1,000 payable to American Pacific Dairy Products. It was deposited some time in February. I don't get the date. I can't tell the date it [228] was paid; the cancellation machine has gone right through that. It was deposited in the States early in February.

The Court: I am not sure, Mr. Phelan, I understand the purpose of this. It appears to be normal business transactions.

Mr. Phelan: I think it also has a bearing on Mr. Siciliano's management; for the period of approximately one year less than 20 bank deposits were made for a business of this size.

The Court: Well, I am assuming that we are not concerned with that because Mr. Thompson has already stated that he is satisfied with the reports which were furnished and that those correctly state the business, as correct as possible, that was transacted.

Mr. Phelan: Yes, but I want to bring out and show the lack of proper business management. I am not trying to account for that money over a period of a couple of months running when Siciliano's management didn't even deposit it in the bank.

(Testimony of Edward Thompson.)

What I want to bring out is Mr. Siciliano's management or lack of management. I also, of course, based upon the direct examination of plaintiff's case, want to account for what Mr. Thompson did with all those checks that went to him.

The Court: Yes, I am not sure that the bank account is as nearly valid as the books. I quite agree with you that it is difficult to understand why, having a bank account, the bank account is not used for the payment of bills and accounts as a control over receipts and expenditures, but the fact is that [229] it didn't; that the bank account does not reflect the business transactions.

Mr. Phelan: That is true. I want to bring that out.

The Court: So that you have to go to your books.

Mr. Phelan: Yes.

Q. (By Mr. Phelan): Now, Mr. Thompson, you left Guam in June of 1952? A. Yes, sir.

Q. Did you return to Guam? When was the next time you returned to Guam?

A. December 28, 1952.

Q. How long were you on Guam at that time?

A. Until about the 4th or 5th of January, I would guess.

Q. Did you go down to the Dairy Queen?

A. Oh, yes.

Q. Would you describe the conditions of the Dairy Queen as you found them?

A. Well, the first day I got up here, of course, I

(Testimony of Edward Thompson.)

went up to the office to see Henry Diza. I wanted to straighten some things out with him. While I was talking to him Joe Meggo and Wally Viet came in. They knew I was in town so I expected to see them. I don't know whether they came in simultaneously or not. Joe Meggo told me we needed more freezers, more deep freeze cabinets for quarts and pints. He said we didn't have enough freezers to take care of the business. Well, I was [230] operating 11 stores in the States and I and friends opened more and I know what it takes without too much trouble. There are about 2,500 of these Dairy Queen stores in the States and I doubt if 50 of them have more than two holding cabinets. We had only one flavor—vanilla. I had sent over other flavors but they had never been used. They were in the warehouse. I told Joe he must be crazy but I would check into it. I went down to the store and the Filipino boys were complaining. They were working seven days a week and working overtime every day. I said I would check into it. I found that instead of working on just one shift, they were working two shifts. I think this boy Tony was the lead man and a pretty good boy and when he got up, the rest of them got up and went down and the store didn't open until 1 o'clock in the afternoon instead of 10. All four men would be there at the same time and all four men would stay there and clean up at night and Henry and Joe Meggo came down to help them, as Henry Diza has testified. There must have been more helpers than there was cubic feet in the store. We corrected those

(Testimony of Edward Thompson.)

conditions. I didn't want to speak to the Filipino boys; I didn't know them well enough and they were sensitive. Wally Viet explained that two men had to come in in the morning and two men in the afternoon. Later on I got a letter from Henry Diza and he said the new shifts were working out and everybody was working and, incidentally, we paid the overtime wages that they had coming to them. [231]

The Court: That was in December?

A. December or the early part of January, 1953. Then I checked on the freezers. At no time during the day was the second freezer in operation until 3 o'clock so when they could not take care of the quarts and pints trade they had to draw out of the freezer, which was not satisfactory, and at no time during that period was the deep freeze holding cabinet as much as half full—I mean as much as half full—and in a letter to Joe I commented on that. On December 31 we were closed on account of the typhoon. I told Joe to get both crews down there at 8 o'clock in the morning. Tony had too much New Year's Eve so I had to get him out of bed and a little after noon Tony came down there——

Q. (By Mr. Phelan): Now during this period you were here about ten days?

A. Not quite ten days—I would say about a week.

Q. During this period did you see Mr. Meggo at the store? A. No, sir.

Q. Did you see Mr. Diza at the store?

A. I think Diza came down once in awhile to get

(Testimony of Edward Thompson.)

a milk shake. He and Wally Viet would ride down to get milk shakes.

Q. How much of the time did you stay at the store?

A. I was at the store every day until about 10 o'clock at night unless I went up to the office to see Henry.

Q. Do you recall how the cash was handled at that time? [232]

A. When I came there was only one shift, only one bank, and Tony would take the cash up at night in his money sack. He would take it to his place, where he lived, and deliver it to Diza the next morning. Then the next morning they would read the cash register if it was working—I presume they would read it.

Q. Were you there when they opened up in the morning?

A. Yes, I was there every morning. I got there about 10 o'clock in the morning.

Q. Mr. Meggo didn't come down to read it in the morning?

A. He might have come while I was there but he didn't come at opening time, no.

Q. Do you remember how the men got down to the Dairy Queen?

A. They came in the reefer truck or some truck.

Q. Did Mr. Meggo drive them?

A. I don't remember. It didn't register if I saw him.

Q. Talking about the snack bar—what was the first time you knew about that?

(Testimony of Edward Thompson.)

A. You mean the addition to the store?

Q. Yes.

A. It was on August 2 when a friend of mine on Guam told me I wouldn't recognize the store any more because they had put on an addition and just about the same time I got a letter from the Fuller Company, a glass company in San Francisco, and Fuller [233] said Mr. Siciliano had ordered some glass like the previous glass but asked that the bill be sent to his post office box in Guam instead of to me in Seattle and they wanted to know what I wanted done about it. I said I didn't know about any need for glass on Guam and I suggested he hold it up until I could check. I hadn't seen or heard from Mr. Siciliano since the 2d. I checked it up and found it was this addition so I did nothing more about it.

Q. When you came to Guam in December was that addition completed?

A. Everything except the glass.

Q. Will you describe the addition?

A. It shoots off the original store in an "L." It is roughly 30 feet long and 15 or 16 feet wide. I heard Mr. Meggo say it was built to sell ice cream from these freezers, but in my mind that would have been impossible for several reasons. One reason is that these freezers, the freezing is done by compressors. Those compressors are cooled by—the Dairy Queen freezers were cooled by running water. Now it is customary to catch that running water in

(Testimony of Edward Thompson.)

a waste pipe which runs under the floor and carries it away. There was no waste pipe to carry off any running water. Second, those freezers each have 2 h.p. motors. It is customary to bury the conduit under the cement and bring it up by each freezer so that the power will reach.

The Court: Now which freezers are we talking about? [234]

A. These are the freezers Joe Meggo said he was going to get for the addition. Furthermore, those freezers were never ordered. They were for a 220 volt power line and there was no 220 volt coming into the store. The wiring was for 110 volt, for a very small house. Furthermore there was a 30 amp. fuse box. You couldn't run a freezer on 30 amps. You need 60. Another thing, the dispensing room or salesroom for the freezers was too long, ten feet more than was needed. Right in the corner where one of the freezers would have to be, the sales window was directly in front. There was roughed-in plumbing for a sink and pipes coming out for water and for the drain, but the sink was missing, but it would have been impossible to put a sink there and a freezer in the same place, so I am of the opinion that the addition was not built for the Dairy Queen operations. At that time the Dairy Queen had money enough to pay for it. American Pacific was not asked to pay for it. The money was paid out of Joseph Siciliano's funds. I knew nothing about it and when I finally talked about it to Mr. Siciliano he said "You must have been excited. We talked about it."

(Testimony of Edward Thompson.)

The Court: Tell me, what use was made out of it?

A. It stayed vacant for a long time. Some time during the summer of 1954 my son wrote and said he would like to convert it into an office and into a bedroom. I told him Joe Siciliano had spent the money and hadn't been reimbursed and if he wanted to take the same chance Joe Siciliano took about losing his money, [235] it was OK. He spent \$400 boarding it up, making it look like the rest of the building and putting in lights and stuff, plumbing and stuff like that.

The Court: Do I understand it was never used until it was converted for housing?

A. Except the back half.

The Court: Now where did you do your warehousing?

A. Out toward Tamuning; I don't know the legal description but you go past the Talk of the Town and turn left. We have rented a warehouse out there.

The Court: How much do you claim for this addition?

Mr. Bohn: I think it is roughly \$4,000.

Mr. Phelan: Around \$4,000.

The Court: The court will take a 15-minute recess at this time.

(The court recessed at 10:55 a.m., February 15, 1955, and reconvened at 11:40 a.m., February 15, 1955.)

(Testimony of Edward Thompson.)

Mr. Phelan: Will you please read back the last question?

(The reporter complied with the request.)

Mr. Phelan: May this be accepted in evidence, your Honor? It is the certified articles of incorporation of the American Pacific Dairy Products, properly certified, by the State of Washington.

The Court: Have the witness identify it.

Mr. Phelan: Will you identify this? [236]

A. Yes, these are articles of incorporation. I got them from the Secretary of State, State of Washington.

The Court: That is Defendant's Exhibit A?

A. Yes.

Q. (By Mr. Phelan): Mr. Thompson, I show you a paper which purports to be a certified copy of excerpts from the minutes of the board of directors. Can you identify that?

A. Yes, that is a resolution appointing Joe Siciliano as agent on Guam.

Mr. Phelan: May this be accepted as Defendant's Exhibit B?

Q. (By Mr. Phelan): I show you a document which purports to be excerpts from a special meeting of the board of directors held August 22, 1951. I show you that. Can you identify that, Mr. Thompson?

A. Yes, this is a resolution rescinding the appointment of Joe Siciliano as manager on Guam.

(Testimony of Edward Thompson.)

Mr. Phelan: I offer this as Defendant's Exhibit C.

Q. (By Mr. Phelan): I show you a document which purports to be excerpts from the annual meeting of the board of directors on February 25, 1952. Can you identify that document, please?

A. Yes, this is a copy of the minutes of the meeting.

Mr. Phelan: I believe this is D.

Q. (By Mr. Phelan): Mr. Thompson, I show you a document which purports to be excerpts from special meeting of the board [237] of directors of American Pacific Dairy Products on the 6th day of October, 1952. Can you tell us what that document is?

A. This is excerpts from the minutes of the board of directors meeting on October 6, 1952, yes.

Mr. Phelan: I believe this is Defendant's Exhibit E.

Mr. Bohn: Do I understand, Mr. Phelan, you are introducing these in evidence not in order to establish the truth of the facts therein set forth but merely that they were actions taken by the board, is that correct?

Mr. Phelan: Yes, these are copies of actions taken by the board since they have been attached to the pleadings and they have been discussed.

Mr. Bohn: I won't object on that basis.

Q. (By Mr. Phelan): Will you examine that document and tell us what it is?

A. This is excerpts from the minutes of the

(Testimony of Edward Thompson.)

special meeting of the board of directors held April 4, 1953.

Mr. Bohn: No objection if they are introduced just for the purpose of the action of the board.

Mr. Phelan: That will be F, Cris.

Q. (By Mr. Phelan): Mr. Thompson, just before we recessed you said something about that extension down at the Dairy Queen?

A. I was discussing it, yes.

Q. Would you describe the layout of it? Did you mention the partition, that is what I mean? [238]

A. There was a front room and back room, yes. Do you mean as it was originally?

Q. Yes, when you saw it in December.

A. Yes, there was a partition. It was divided into a front room and back room and the back room was a small storage space.

Q. Approximately what were the dimensions of the two divisions of that "L"?

A. I would say it was about 30 inches long—

The Court: You mean feet?

A. Feet, yes, sir, and the front room was about 12 feet wide and the back room would be about 6. I measured the front but I didn't measure the back.

Q. (By Mr. Phelan): Now, Mr. Thompson, can you show where in the books of the Dairy Queen are the amounts of money that were transmitted to you for purchasing supplies in the states? Can you point that out in the books?

A. Oh, yes, it is in the books.

Q. The money that was sent to you?

(Testimony of Edward Thompson.)

A. Yes, it is in that book that is folded over there. That is the one because yesterday when Mr. Bohn was calling out these amounts I was checking them against the books.

The Court: Now let's have it understood that it shows that the money was sent to Mr. Thompson but it doesn't show the purpose. [239]

A. No, the books only show the money was sent. The purpose was set down in the journal entries.

Q. (By Mr. Phelan): Have you got the purpose?

A. I have got the journal entries which say for supplies or mix.

Q. Can you get them?

A. I can get up and get them; it might be quicker. Now for instance, here is a letter from Henry Diza dated August 5, 1952. He said, "Dear Mr. Thompson: I am enclosing a sight draft for \$4,670 in payment of the items listed—40 drums of ice milk solids." On his ledger he charges the difference as the cost of buying the draft and then he mentions some other things underneath there—\$4,610. Now here is another enclosing a bank draft for \$1,728 in payment of the following supplies—well, the amount in the books is slightly more, a dollar or two more, which is due to the bank charge for making a draft. He gives a list of supplies. He has charged those supplies on his books by journal voucher. He would make up a journal voucher to cover those remittances because I would check that and the figures had to balance or I would ask

(Testimony of Edward Thompson.)

questions. I thought it was a high rate for bank interest, but he would make the journal vouchers. For instance, here is one journal voucher. It covers a check for \$1,620.39. He shows he charges supplies—Henry called supplies bags, containers, janitor supplies and things like that, merchandise, that is anything except ice cream [240] toppings—and then he had freight, of course. I paid the freight. And then general overhead and miscellaneous expenses. Those were expenditures I had made—and then credits that check he sent me.

The Court: What is the general overhead?

A. A general overhead, \$79.86. I would have to look at that, sir.

The Court: I mean did it represent local expenditures?

A. No, sir, that is something I bought for expense rather than supplies. It might be any one of a number of things. It might be freight on repair parts, something like that. It would be a part of the cost of supplies.

The Court: Well, I think that is enough.

Mr. Phelan: I think we should introduce it because everything previously has been conclusions.

The Court: Well, do whatever you want.

Mr. Phelan: I don't want to needlessly prolong the time of the court, but I think we should actually introduce some of these records. I believe they are books of original entry.

The Court: At that time you will also introduce the books which Mr. Norman Thompson received?

(Testimony of Edward Thompson.)

Mr. Phelan: Of course, I am not trying to hide anything.

The Court: Put those altogether and introduce them as one exhibit.

Q. (By Mr. Phelan): Now are there any other books here, [241] Mr. Thompson, that were maintained by Mr. Diza?

A. No, just these two books and the ledger. I don't know what happened to the ledger. Those are just working papers. If you look at them they are the trial balances and things like that which are not books of record.

Q. Were they maintained here?

A. They must have been, yes.

Q. Would you read into the record what these books are?

A. A cash disbursement book and a journal. The journal was used to enter deposits and sales and these are his journal vouchers, month by month, I think. You see it wasn't a very complicated system. These were probably in a bound book at one time. These are just the letters that he sent me with the money.

Mr. Phelan: They should be a separate exhibit if they go in because they are not a part of the books that were turned over. Are those the ones that went to you?

A. Yes, sir, these are the ones that went to me.

Mr. Phelan: Can these be accepted?

(Testimony of Edward Thompson.)

Mr. Bohn: As I understand, what you are now offering in evidence is cash disbursement and cash income account and journal vouchers, is that correct?

Mr. Phelan: Yes.

Mr. Bohn: And that is all you are offering at this time?

Mr. Phelan: At this time, yes. "G" I believe, Cris.

The Court: Now the cash account should be introduced as [242] one exhibit and the journal entries should be introduced as a separate exhibit.

Mr. Phelan: Make them G and H.

Mr. Bohn: The large journal, as I understand it, is cash and the loose-leaf pages now in the possession of the clerk are the journal vouchers?

The Court: Income and outgoing. These are introduced as defendant's exhibits with the understanding that they have previously been identified by Mr. Diza. This is a very bad way to introduce exhibits. These should be fastened together and introduced as one exhibit.

Q. (By Mr. Phelan): Now I am going to ask Mr. Thompson to point out in some of the transactions covered by the checks and payments——

The Court: Ask him what?

Mr. Phelan: To point out in these books the evidences of some of the checks to him, the payments to him or money sent to the States for purpose of supplies. You see, actually, your Honor, all we have got so

(Testimony of Edward Thompson.)

far are conclusions on that and his statement that he bought supplies and shipped them to Guam.

The Court: Now I wonder if you are not unduly complicating this. It is not essential for purposes of this action that we go over every transaction.

Mr. Thompson: I was about to say, your honor, that Henry Diza's figures on the reports he sent to me showing how we [243] stood on this trust fund always agreed with my figures. I didn't question his figures when his statements would come through.

Mr. Phelan: Perhaps we can show those figures are in these books and we won't have to go any further.

The Court: It seems to me you have tied this thing up until approximately May 1, since both parties are in agreement as to the reports. Now those reports are based upon your cash book, your journal entries and others. If you agree on those reports, as you have, it isn't necessary to go in back of them surely.

Mr. Thompson: I checked them and especially the amounts he had me charged with or credited with as the case may be. When he showed I owed him \$500 as money unexpended, I would check with my figures and it always checked. If it hadn't, of course, I would have taken it up with him but in every case it did.

The Court: Do you have reports, Mr. Thompson, for every month that the business was operated by Siciliano?

Mr. Phelan: Well, there are such reports avail-

(Testimony of Edward Thompson.)

able. I do not have them. They are in the custody of Mr. Thompson. They are available here in the room.

A. They are available for every month. In fact, your honor, there are reports of a similar nature for every month the business was operated except the month of June, '53, but the same system of reports were continued by the successive operators and the same format was followed. [244]

The Court: Well, of course, it would be of assistance if all these reports were bound, fastened together in consecutive order.

Mr. Bohn: I would welcome that, your Honor. With apologies to Mr. Phelan, Mr. Thompson just stated he would be willing to bind them together during the noon recess consecutively because that gives us the best picture in capsule form that we can get.

Mr. Phelan: Are these the reports, Mr. Thompson?
A. Yes, these are the ones.

Mr. Bohn: As I understand the situation, and if my interpretation is out of order I apologize, those reports are complete with the exception of that one month?

Mr. Phelan: June, '53. If Mr. Thompson can put them in order and get them stapled, we can introduce them all as one exhibit.

The Court: Yes, that was my thought. There was a report originally for July, '52?

Mr. Bohn: There was one for June also, too, your Honor. They start with June of '52, and con-

(Testimony of Edward Thompson.)

clude with November of '53, and Mr. Thompson testified—I beg your pardon—from June of '52 through November '54—and Mr. Thompson testified that he had not yet had the report prepared for December.

The Court: Yes, I think it would be well to have all of those. [245]

Mr. Phelan: He may have information about June.

Mr. Thompson: It can be picked up easily.

The Court: Then you are going to fasten those and introduce this other separately?

Mr. Phelan: Well, I want to ask him some questions about those.

Q. (By Mr. Phelan): Now, Mr. Thompson, from these reports can you compute the expenses? Do they disclose the expenses broken down by categories for each and every month?

A. The reports show expenses broken down by categories, yes.

Q. And those expenses are supported by other books of the corporation? A. Yes.

Q. You can show the various items of expense, supplies, personnel and all that?

A. They are in the reports.

Q. And you can show the profit by month?

A. It's in there.

Q. And loss? A. Yes.

Mr. Phelan: I think until I can start asking questions on the books I am about through with questions. When we get the books introduced I

(Testimony of Edward Thompson.)

can then ask him further questions along the line we are discussing. [246]

The Court: Well, of course, the books speak for themselves. I am not attempting and will not attempt to compile all of the information contained in the books. I understood at the pretrial conference that all of these were to be audited and an accountant was going to testify.

Mr. Bohn: The statement was made that we were going to have these books audited. Mr. Miller has checked them. He has not performed a complete audit and the reason being not only the shortness of time but the further thought that in the event your Honor wished to determine the legal points in the trial and then assuming there are logical reasons for it, the possibility would appear for the appointment of a receiver for a complete accounting. I would be happy to have Mr. Miller present if the court would like to hear him, but it was from his report that I was asking the questions yesterday.

The Court: What does his report cover?

Mr. Bohn: It covers basically the information which has already been brought before the court.

The Court: Does it give you totals?

Mr. Bohn: It gives us totals, that is correct, and the totals are all in those reports and he has spot-checked them as Mr. Thompson has done and found no discrepancies so far with the exception of—

The Court: I recall that the record to date gives us no totals. It gives us a month to month summary,

(Testimony of Edward Thompson.)

according to [247] your compilation, but we have no compilation before us as to totals.

Mr. Thompson: If I may interrupt—we have been discussing profit and loss but in those same reports there is a statement of the financial position of the business that is a total.

The Court: Is it cumulative? A. Yes, sir.

The Court: Let me have the report for May of 1953.

A. Yes, sir.

The Court: I would like to see one of them.

A. They are not in sequence. Always the last one. This is cumulative up to date from the beginning to the end of May. That is the financial position of the corporation.

Q. (By Mr. Phelan): From the opening day, Mr. Thompson?

A. From the opening day right straight through to the end of May, '53, and that was taken from the books of the company.

The Court: I presume, Mr. Thompson, that you outlined the type of report that you wanted?

A. I did, sir.

The Court: I can't imagine them going into this detail unless you did.

A. I asked for it, yes.

The Court: And you told him in detail? [248]

A. Exactly how it should be done, and I think they followed instructions from the beginning.

The Court: Now I would just keep this among

(Testimony of Edward Thompson.)

the exhibits because you are going to introduce all of them.

Mr. Phelan: Yes.

The Court: And we will take our noon recess and one of the matters that came up in discussion with counsel which was not incorporated in the record, Mr. Thompson, was the statement that during the period that the Siciliano interests were operating this business that your gross sales showed a profit. There was a profit of around 33 per cent but after Norman took over the operation, with the same amount of sales, there was only a profit of 16 or 17 per cent and since that question would arise, I wonder if during the noon recess you would give it some thought so that we can refer to it.

A. All right.

The Court: The court will stand recessed until 1:30.

(The court recessed at 12:10 p.m., February 15, 1955, and reconvened at 1:30 p.m., February 15, 1955.)

The Court: You are not through with Mr. Thompson?

Mr. Phelan: Not yet, your Honor.

Q. (By Mr. Phelan): Mr. Thompson, I show you a file—I believe the court has one of these reports?

The Court: I have May, 1953.

Q. (By Mr. Phelan): Containing various documents purporting [249] to be reports of the opera-

(Testimony of Edward Thompson.)

tions of the business known as the Dairy Queen and ask you if you will look at that and tell us what it is?

A. This is the reports from the beginning of June, 1952, through November 30, 1954, with the exception of June, 1953, and May, 1953. The court has May, 1953.

Mr. Phelan: May it be considered as part of this?

The Court: Yes; with your permission I will just attach it and have it introduced as one exhibit.

Q. (By Mr. Phelan): The only one missing is June, 1953? A. Yes.

Q. Will you tell us why June, 1953, is missing?

A. We didn't make any for that month. There was none made for that month.

Mr. Phelan: I believe this is Defendant's Exhibit H and the one the court has is part of this exhibit.

The Court: Yes; I will just attach this.

Q. (By Mr. Phelan): Now, Mr. Thompson, what do these exhibits show?

A. They show the results of the operation of the business at the end of each month and show the financial position of the company at the end of each month.

Q. Do they show the expenditures and sales?

A. Oh, yes; it goes into detail.

Q. Does it show the monthly profit and all [250] that?

A. It shows the cumulative profit but it is easy

(Testimony of Edward Thompson.)

to determine the monthly by subtracting the cumulative from the previous report.

Q. Now, Mr. Thompson, have you, yourself, personally kept the books for this corporation for any period of time whatsoever?

A. Oh, I did for two months.

Q. Did you keep tabs on how long it took you to do that?

A. Yes, I did. I kept the books, did all the posting, made the journal vouchers and incidental work for the months of April and May, 1954. It took about an hour and 15 or 20 minutes for the work I did. Of course, I wrote up no checks and I didn't handle the payroll and I accepted the figures of the sales and just added them up.

Q. Mr. Thompson, the figures in these last reports put in—do you know what their source was?

A. Well, up to a certain period they were from Henry Diza. After that from Norman Thompson.

Q. Where would they get those figures?

A. They would get them from several sources. For instance, sales would be the amount of money turned in each day; the expenses would be the payroll they incurred on Guam, the miscellaneous expenses incurred on Guam, the utility charges paid on Guam, a two per cent sales tax on Guam, plus the cost of the materials of various kinds that I bought in the States and making the adjustment in inventory, the goods on hand. [251]

Q. These reports would be made up from the vouchers and other books of record in the business?

(Testimony of Edward Thompson.)

A. They would be made up from the books of record, yes, the vouchers supporting the books of record, but they would be made up from the ledger.

Q. This is really an analysis of the books for the month?
A. Yes; that is it.

Q. Now, with respect to the merchandise you ordered for the business in the States for which money was sent to you to pay for, how do these books account for that?

A. They check out with the figures I kept in the States.

Q. Mr. Thompson, do you have any other books for the business known as Dairy Queen?

A. I have a journal we use at the present time, yes; it is here.

Q. Do you know what period that covers?

A. I think from July, 1953, to date.

Q. Do you have any other books present?

A. Oh, we have a ledger but the recaps of all of those are found in the States on file.

Q. And these other books of record are the supporting documents from which you or Mr. Norman Thompson made the reports you submitted?

A. No; did I say I or Norman Thompson made the report? I didn't make them. [252]

Q. But the present set of books supports the figures in those reports?
A. Oh, yes.

Mr. Phelan: Your witness.

(Testimony of Edward Thompson.)

Cross-Examination

By Mr. Bohn:

Q. Mr. Thompson, I would like to ask you some questions about these figures and about these reports. There appears from your testimony to be no substantial conflict in the figures submitted from here in either tenure of management and those which you, yourself, kept and checked. Now I have made some quick calculations and I find, subject to the correction in mathematics, that the following are the percentages of profit to sales during the months which Pacific Enterprises, the Siciliano organization, operated this business: The first month for which a profit and loss statement is contained, according to my records, is September, 1952. That month I show that the profit was 45 per cent of the sales. A. That is gross or net profit?

Q. Well, the profit as set forth in the report. For the month of October I find the relationship of sales to profit in the report as showing 41.9 per cent. For the month of November the percentage is 41 per cent. For December it is 32 per cent; for January it is 38.2; for February it is 37.5 per cent; for March it is 40.2 per cent; for April it is 37 per cent. That is, [253] as I understand the testimony of all the witnesses, the last month that the Siciliano organization operated this business. Beginning in May the first figure I have of the relationship of profits set forth to sales is 34 per cent; for June we have no figures at all; for July I find it has dropped

(Testimony of Edward Thompson.)

to 17 per cent; for August it goes up to 27 per cent; for September it is 27 per cent; for October it is 28 per cent—wait a minute—there seems to be something wrong with these figures. May I be excused just a minute? Correction—my figures indicate that in October the proportion of profit to sales is 20.8 per cent; the next month it is 24 per cent; the next month, which would be December, '53, 21 per cent; the next month, 22 per cent, January, '54; February of '54 it is 20 per cent; March of '54 it is 19 per cent; April of '54 it is 18 per cent; May of '54 it is 19 per cent; June of '54 it is 18 per cent; July of '54 it is 20 per cent; August of '54 it is 20 per cent; September of '54 there is a 54 per cent loss in relation to profit; in November there is a 14.6 per cent loss; rather in October there is a 14.6 per cent loss and in November a 15.7 per cent loss. Now if my percentages are correct there never was a single month during the operation of Norman Thompson where the ratio of profit and sales was as great as the smallest month in the previous operation. Do you have any explanation for that?

A. Yes, I think you are right at that. The sales when we first opened were terrifically high and we were making about [254] 65 per cent on every dollar we took in. Now, when Norman first came in the sales held up fairly well, but as you will notice in those early days the percentage of net profit dropped for these reasons—we had to send Norman Thompson over here. That cost us \$600, roughly. He was drawing a salary of \$500 and we were paying \$46 a

(Testimony of Edward Thompson.)

month for power. The Government of Guam put in a meter and now we are paying over \$200 a month for power. In the early days when we were running up those percentages we had very little for expenses, very little for warehouse or for drayage—all of those account for the differences.

Q. In other words, those services you just mentioned were the services performed by Siciliano's organization? A. Yes, that is right.

Q. I would like—if my percentages are correct, for the 11 months ending in April, 1953, the percentage of profit to gross sales was 37 per cent. I was unable to get an 11-month period during your operation because of the way the figures are set up, but I took a 12-month average, which would be for the period ending August, 1954, from September 1, 1953. There is one additional month involved, but if my figures are correct, the gross is almost identical for the 11-month period previously specified for Siciliano's organization. The gross is \$81,361.03 and for the 12-month period I just mentioned for Norman Thompson's operation it was \$81,000.73. One was for 12 months and one [255] was 11.

A. No, Siciliano's operation couldn't have been 11; it was probably 10.

Q. Now, during that period of time the Siciliano average was 37 per cent. If my percentages are correct, your average was 20 per cent as between sales and profit. Now, conceding that there is one month's difference—

(Testimony of Edward Thompson.)

A. Almost two months.

Q. And hence there would be some difference because of the difference in time, nevertheless there is the substantial difference. What, in your judgment, accounts for that difference?

A. Additional expense for Norman Thompson's salary, warehouse and so forth. It made a difference.

Q. Do you pay your own travel expenses?

A. Yes, I always have.

Q. And part of your original capital was travel expense? A. Yes.

Q. Now, I have a few more questions to ask you on these books and reports you have. As I understand the situation there has been placed in evidence a cash book showing cash income and cash disbursements. There also has been placed in evidence journal vouchers. There has also been placed in evidence these reports which we have been discussing previously in the record. There has not been placed in evidence, as I understand, the general ledger? [256]

A. That is correct.

Q. Now, a general ledger has always been kept, has it not? A. Always been kept, yes.

Q. Now, I think I asked you about it yesterday—the general ledger that has been kept is this book which I am now showing to you?

A. Well, there was one before that, but a similar one, I presume.

Q. What is the first entry in this ledger?

A. I would say July 1, 1953.

(Testimony of Edward Thompson.)

Q. And that does not include, obviously, any of the records kept by Mr. Diza?

A. That is right, sir.

Q. Can you tell us where those records are?

A. Some of them are over there—the journal vouchers and the books of original entry. I don't know where the ledger is. I never saw it. Norman Thompson admitted he gave him the ledger. He doesn't remember giving it back. He searched for it around the office and it has been lost.

Q. Can you tell what happened to the business during the month of June, 1953?

A. I can just give you the sales, that is about all.

Q. Can you give me the profit and loss?

A. Not right here. It would be in Seattle, but I haven't the figure here. [257]

Q. Well, why were the books for the month of June retained in Seattle and the books for the remaining months brought out here?

A. Well, I will tell you why that is. I wrote the books up in July and started out to set the books up out here as of July 1, 1953.

Q. We have the report for May and, in accordance with your previous testimony, that reflects the condition of the books for May, and therefore we may assume that is an accurate reflection of the business. We apparently have nothing before us whatsoever for the month of June, 1953?

A. Not here we haven't.

Q. Well, how do you account for the fact that you have accounted for every month meticulously

(Testimony of Edward Thompson.)

—both yourself, Norman Thompson and Mr. Diza have accounted for every month meticulously and are in agreement except for the month of June?

A. Well, I will tell you. It was in May, 1953, they sent a notice to Joe Siciliano that American Pacific Dairy Products had refused to ratify the contract. Termination was the term I think they used, so I got a new set of journal and ledger because from then on we were going to carry it as a corporation, breaking off the agreement. So, the month of June, I kept that in Seattle. July 1st I transferred the net results to another set of books and sent them over to Norman and told Norman to keep them from then on. [258]

Q. Did you make the entries for the month of June? A. Yes, in the books in Seattle.

Q. You never transferred them out here?

A. We never transferred them. That was an oversight on my part. The need for it didn't occur to me to tell you the truth.

Q. Do you have the report for May?

A. Yes.

Q. You have the records for July, not for June. Let's go back for a moment. June was the month when—withdraw that question. Going back to a question that I asked you when I called you as an adverse witness yesterday—I want to again point out to you this: That as of May 31, 1953, the sales were \$91,806.67; profit was \$31,403.47, is that correct? Is it not the figures taken from the report?

(Testimony of Edward Thompson.)

A. If that is the figure, that would be correct, yes.

Q. Now, there is no report for June. The next report we have—is there no report for July?

A. There is a report for July, is there not?

Q. A report for July—if so, I haven't seen it. Could we check that list and see if it is there? I beg your pardon. I stand corrected. There is a report for July. In the report for July, the gross sales are less than in the one for May?

A. That is right, yes.

Q. And the profit is roughly half what it was for the [259] month of May? A. Um-huh.

Q. All right. You testified yesterday that the reason for that was that you had cut off the operation as of August 31, 1952, and that therefore you made adjustment; that the reason for this apparent discrepancy was that this reflected the figures not from June, 1952, to July 31, 1953, but from September 1 of 1952 to July 31 of '53, is that correct?

A. Yes, I would say that is correct, yes.

Q. Now, then, can you find for me anywhere the profits as of August 31, 1953—I beg your pardon—August 31, 1952—sales and profits.

A. You mean August, '52? They are in the old books.

Q. They are in the old books? A. Yes.

Q. And where are the old books?

A. Well, the old books were the ones that Henry had, but we kept duplicates those days in Seattle. We just transferred Henry's figures over to them.

(Testimony of Edward Thompson.)

Q. Now, the only information I have from those reports is this: I have information that there were sales totaling \$20,570.10 as of August 31, 1952. I do not have a profit figure for that month since the first profit figure appears in the succeeding month. Since you used that as the cut-off date and undoubtedly used it in the end of the year transactions, can [260] you tell us what that profit was?

A. I can't tell you off-hand because I don't have the figures here.

Q. Can you give us an estimate of what it was?

A. For what period, again?

Q. August 31, 1952.

A. I don't know, but we paid 8,000-some-odd dollars tax on it; I remember that.

Q. Now, I am not trying to confuse you, Mr. Thompson. I am going to ask you to reconsider that answer. I am talking about the period ending August 31, 1952.

A. Oh, yes, it wouldn't be that high. I don't know what that was. I haven't the figure. I would be at a loss to give you anything.

Q. Did you pay a tax on that amount?

A. I think we paid a very small tax.

Q. Have you sought, since you have been on the island, to check with the income tax people to find out just what that profit was you reported?

A. No, I have not.

Q. Have you made inquiry of your office in Seattle?

(Testimony of Edward Thompson.)

A. I did not. Mr. Phelan, maybe, has. I did not know the matter was coming up.

Q. We do, however, have the sales which were \$20,570.10, as I mentioned? [261]

A. That is right.

Q. Turning then to July 31, 1953, if these reports reflected the total operation from the beginning date to that period, July 31, 1953, the \$91,298.17 for sales would be increased by roughly \$20,000, is that correct?

A. Will you repeat that question? I think it is correct.

Q. The report shows sales, \$91,298.17.

A. Up to when?

Q. August 31, 1953. A. No, July 31, 1953.

Q. July 31.

A. That is the correct figure, yes.

Q. But if you were to add to that the \$20,570.10 for the period ending August 31, 1952, that would be an accurate reflection of the total to that date?

A. Total gross sales, yes.

Q. So it would be something in the nature of \$110,000? A. That's about right, yes, sir.

Q. Now, your profit figure set forth as of July 31, according to the report, is \$16,077.36, is that correct? Now, is that an accurate figure?

A. I don't remember it and I don't know.

Q. May I have the report—that stack of reports? I am going to show you the financial statement on the report as of July 31, '54, and ask you what the

(Testimony of Edward Thompson.)

profit was for the period of [262] time reflected by that report?

A. It shows \$15,091. Is that '54?

Q. No, this is '53.

A. I am looking at the wrong one.

Q. July 31, '53. A. Yes, it shows—

Q. Let me ask, first of all—your counsel has just asked me a question—what period does that report cover?

A. That report is supposed to cover the period from August 31, 1952, through—was this July?

Q. July of 1953, yes.

A. From September 1, 1952, through July 31.

Q. What do you show as profit as of that period?

A. I don't know. This report shows \$16,077.36.

Q. Is that the accurate profit?

A. No, we discussed that yesterday.

Q. What is the accurate profit for that period?

A. It would be this plus the amount of inventory on hand. In preparing this profit and loss statement, they forgot to give credit for goods on hand. It shows all the mix purchased and all the merchandise purchased and all the supplies and, of course, that was not right.

The Court: In order to avoid confusion, Mr. Thompson, I wonder if you will not find that the amount of inventory at any time did not run anything like that amount? [263]

A. I beg your pardon?

The Court: The amount of inventory at any one time did not, as a rule, run that high?

(Testimony of Edward Thompson.)

A. No, this is the amount of goods sold.

The Court: That would only bring it to \$21,000?

A. Merchandise on hand—let us take a look at the following month's inventories. Inventories would run about \$10,000, so that runs about \$26,000, roughly.

The Court: Which is still much less because you show as of May 31, a profit of \$31,000.

A. Oh, but that had been transferred to surplus, your Honor. You see, at the end of the fiscal year, we transfer the profit to surplus each month and keep an accumulated total for 12 months.

The Court: Then the \$16,000 would not be cumulative, then?

A. Only for the period mentioned.

The Court: That period would be what?

A. That \$16,000 is an understatement, but that would be the period of ten months—September 1 through July—11 months, I guess.

Q. (By Mr. Bohn): You run September 1, 1952, until the date of that statement?

A. The end of July, so it is 11 months, yes.

Q. What does that report show as your surplus?

A. Here is what the inventory shows—\$10,361, so it [264] shows a surplus of approximately the sum of \$10,000 and \$16,000; it shows \$26,326.80.

Q. May I see that? Now, I am looking at this report and there is a notation—the same thing I referred to yesterday—"Copy of what I sent to Dad." You have here a statement contained in this report reading as follows: "Surplus, using your

(Testimony of Edward Thompson.)

figures, \$26,326.80." Now, that is the surplus for what period?

A. For the period from the beginning up to the end of that date after paying taxes.

Q. In other words, that is the profit from the first day of operation to and including July 31, less payment of taxes?

A. Less payment of taxes, yes.

Q. Now, as of that moment, you have \$26,000 in profit, net profit? A. Yes. ..

Q. Now, the same report shows a net profit for the period, which would be a different period of \$16,000 and some-odd dollars, which you have just testified is inaccurate and you have also just testified that because of an inventory error the profit for that period should be something like \$26,000. All right, now, is that \$26,000 in profit to be added to the \$26,000 in surplus to make a total profit for the period? A. Oh, no.

Q. Well, what is the difference between the figure you have set up for surplus and the figure you have set up for [265] profit?

A. The difference is approximately \$10,000 in inventory that we omitted.

Q. Then the surplus or profit, whatever you want to call it, for that period is how much? How much profit did this business earn for that period or any other period?

A. I am just reading from what I see. This is obviously wrong because I can look at the ledger

(Testimony of Edward Thompson.)

and see the charges for mix and merchandise, supplies——

Q. What I am trying to get, Mr. Thompson, is the correct figure. Now, it is apparent that at this stage of the proceedings you elected to change your system of keeping these cumulative reports. I am trying to reconcile them.

A. It wasn't a question of electing. It was because of the corporation. We had to file on corporate returns.

Q. That is assuming you were going to ignore the existence of this partnership?

A. That's it, yes. It shows a total profit to the end of July of \$26,326.80 after taxes.

Q. That is net profit?

A. That is right, sir.

Q. That is from the beginning of the operation to that period?

A. No, from September 1—oh, yes, after taxes—surplus after taxes. [266]

Q. So let me—and my terminology may be clumsy and if so I am perfectly willing to stand corrected—but I am trying to find this fact: Then as of that time if you had gross sales for the period to August 31, '52, of \$20,000 and gross sales since that time of \$91,000, you have roughly \$110,000 in gross sales. If you add the profit for the entire period and deduct the taxes you have a surplus and a profit of something like \$26,000?

A. Yes, I would say so.

Q. So your surplus figure does not reflect the

(Testimony of Edward Thompson.)

period September 1 to July 31, '53? A. No.

Q. Your surplus figure reflects from the beginning to that time? A. That is right, sir.

Q. But your gross sales figure reflects not from the beginning to that time but from September to that time.

A. The gross sales show—yes.

Q. So the period for which you computed your sales varies from the period you computed your surplus for?

A. Regardless of the year, the surplus is cumulative in the business.

Q. What is the profit figure you are continuing there? You testified that the profit figure was off about \$10,000?

A. It seems to be off about \$10,000, yes. [267]

Q. If that was off \$10,000, wouldn't that increase the surplus by \$10,000?

A. No, because it says the surplus "using your figures." Perhaps I checked it and found out something was wrong.

Q. You see what I am getting at?

A. I see it.

Q. I think we ought to have the information. If I am asking the question the wrong way, give it to me in your own words.

A. I am trying to pick it out from the books quickly, but I am unable to do so. You understand I have never made an audit of these books and these statements.

Q. Perhaps my question is not clear. Is there

(Testimony of Edward Thompson.)

any question about what I am trying to find out?

A. What is it again?

Q. Your report shows sales of \$91,000 plus for the period starting September 1, '52, and ending July 31, '53, is that correct?

A. That is right, yes.

Q. Your same report shows profit for the same period of \$16,000, is that correct?

A. I think it is wrong.

Q. I know that, but that is what the report shows?

A. I think it is about \$10,000 wrong.

Q. So, then, following on that assumption, the profit from [268] September 1, 1952, until July 31, 1953, is approximately \$26,000, is that correct?

A. Yes.

Q. How do you account for the fact that your total surplus for that period plus the other two and a half months is only \$26,000?

A. If I had the figures in front of me I would be able to tell you, but—

Q. Well, it seems apparent—without meaning to be disrespectful—that there is a discrepancy in these figures, and we are trying to find out what they are. In one case you have a surplus for 14½ or 15 months of \$26,000; in the other case you have got a profit of \$26,000 for 12 months. Now, how do those figures reconcile?

Mr. Phelan: May I ask one question: The taxes—are they reflected in both figures?

(Testimony of Edward Thompson.)

A. No, the taxes are reflected only in this surplus. That is surplus after taxes.

Q. Would taxes change that profit figure for the period from 1 September?

A. I will tell you what might have happened—I don't remember how this thing happened.

The Court: I was wondering if this was possible—whether in setting up the corporate books as of July 31, you took out 50 per cent of previous profit which showed on your corporate [269] books and not necessarily upon these reports?

A. No, sir, it wasn't there. What I probably did do—I haven't the figures here—that \$4,000 that we wrote off—I might have written it off on the books in Seattle and claimed it as a deduction in taxes.

Q. (By Mr. Bohn): Which \$4,000 was that?

A. Well, between that \$42,500 and Joe said we overspent and we reached a figure of \$38,000 plus—I may have claimed that as a deduction by the corporation.

The Court: As a loss?

A. As a loss, yes.

Mr. Phelan: May I ask one question: The surplus is after taxes. Is the profit in these reports after or before taxes?

A. No, they are before taxes.

Mr. Phelan: So it's hardly fair to compare.

The Court: You set up taxes as a reserve monthly?

A. No income taxes, no.

The Court: Isn't that the better procedure?

(Testimony of Edward Thompson.)

A. It is the better procedure but that was never done, your Honor.

The Court: So you have no reserve?

A. No reserve for income tax at all.

The Court: In other words, you don't have the answer to these questions? You just don't know?

A. That is right, sir. [270]

Q. (By Mr. Bohn): You don't have the profit for the period ending August 31, '52, is that correct?

A. I haven't the figures available.

Q. You can't tell us what the profit is from September 1, 1952, to August 31, 1953?

A. Yes, I could do that.

Q. Will you please tell us what that figure is?

A. I should be able to do that. The profit and loss statement says for the period, \$26,966.70, for the fiscal year ending August 31, 1953.

Q. The figure you can't give us is the profit for the period ending July 31?

A. No, I can't give you the figure for the period ending August 31, the previous year, either.

Q. So, you have on August 31, '53, a net profit for that fiscal year of how much?

A. \$26,966.50.

Q. Is that after the payment of taxes?

A. No, that is before the payment of taxes for that period and we paid 8,000-some-odd dollars for that period.

The Court: I am still unable to understand how you had \$30,000 profit on May 31, and operated the

(Testimony of Edward Thompson.)

months of June and July at a profit and still have less in August.

A. I think the answer would be at that time we charged off the deduction of \$4,000 against Joe Siciliano. That might [271] be the answer; I don't know.

The Court: That would have nothing to do with this?

A. No, I didn't keep the books.

The Court: That was a loss assumed by the corporation exclusively?

A. I had records in Seattle and as they would come in I would check the items in which I was interested and if they were wrong, I would write about them, or if they appeared wrong. Sometimes they were right.

Q. (By Mr. Bohn): Now, I would like to go back to your capital investment in this transaction. Do you have anywhere in these books or elsewhere on Guam, a breakdown of just exactly how much was put into this enterprise by American Pacific Dairy Products prior to June of 1952?

A. We had \$43,250 outstanding stock.

Q. Well, what I am trying to get at is just what you had expended on Guam as of that time?

A. There was a statement given Joe; it was \$42,000.

The Court: Now, it seems to me that has been answered by the agreement of the parties.

Mr. Bohn: I think that is correct, your Honor. Do you mean the amended agreement?

(Testimony of Edward Thompson.)

The Court: Well, yes, in any event there was \$15,000 cash and the assumption of \$8,000, plus, liability to the corporation. [272]

Mr. Bohn: Yes, and I have——

A. And that was paid off. The corporation had in \$19,000 and Siciliano had in \$19,000.

Mr. Bohn: That is correct. The purpose of the line of questioning was to indicate I included in that various expenses and that sort of thing, which we do not complain of.

The Court: Obviously, you have to have expenses.

Mr. Bohn: I do not complain of that figure; I simply want to call it to your Honor's attention.

The Court: Well, it does seem a wide discrepancy when you talk about a building for \$15,000 and then talk about \$40,000, but that is understandable when you consider doing business on Guam in the spring of 1952.

Mr. Phelan: If your Honor please, I believe that figure included more than the building—supplies and equipment, etc.

The Court: It included supplies and equipment, legal, transportation of Mr. Thompson, everything incidental to getting the business under way, but insofar as the plaintiff and defendant are concerned they have come to an agreement. They came to an agreement as to what this operation was worth and they came to the agreement it was worth \$38,000.

Mr. Bohn: That is correct. I will then have no further questions along that line to ask.

(Testimony of Edward Thompson.)

Q. (By Mr. Bohn): Now, Mr. Thompson, I want to run over a few matters that you mentioned in your direct testimony. It is [273] a fact, is it not, that you offered Siciliano 50 per cent interest in this business in January, 1952?

A. No, I asked him if he would be interested in a 50 per cent deal; that I was now convinced it would be a good arrangement for us.

The Court: Now again, Mr. Bohn, I don't want to cut you off, but you are building up an extensive record, and I think everybody is in harmony on these prior negotiations. In other words, your course is very clear. First, Siciliano acted as a friendly agent while the corporation was getting started in Guam. Secondly, negotiations whereby he was to take a 20 per cent interest in the corporation, not necessarily any management, but buy a 20 per cent interest, and finally, a determination on the part of Mr. Thompson that the best operation out here was to contemplate a 50-50 proposition with Siciliano. That is correct, Mr. Thompson, isn't it?

A. That is what I understood. It is in the record. I think I have said that.

The Court: In other words, it is perfectly clear at all times that the corporation wanted Mr. Siciliano's interest in this activity.

Mr. Bohn: Very well, your Honor.

Q. (By Mr. Bohn): Now, Mr. Thompson, you have testified that this corporation refused to ratify this agreement. Is that the substance of your testimony? [274]

(Testimony of Edward Thompson.)

A. No, sir, I said in October of '53, they ratified on condition that Mr. Siciliano get back to Guam within 60 days. I think the record speaks for itself.

Q. Now, this corporation then, neither ratified nor failed to ratify this agreement for the period starting in June and ending in October, is that correct?

A. Well, for the period starting in June is not quite right, because I'd have to have the paper before me, and it didn't arrive until the latter part of July, so for the period from July until October, they did nothing, but I am afraid if they had done anything it would have been adverse action.

Q. You are now stating then that this was never approved by the corporation during that period of time? A. Until October.

Q. Until October, 1952?

A. It was approved in October, 1952, provided Siciliano got back to Guam.

Q. During all this time the matter was in suspense?

A. Yes, hoping he would get back to Guam.

Q. In suspense?

A. Yes, we wanted him back there. We didn't want to break off negotiations.

Q. Regardless of what you wanted, you signed the contract in June, and it was simply in a state of suspense until October? A. Yes. [275]

Q. Now, did you write a letter to Lyle Turner in October, 1952, about this matter?

A. I think I did, yes.

(Testimony of Edward Thompson.)

Q. Do you recall what was in this letter about ratification?

A. I don't recall; I haven't those documents before me. I haven't seen them but I wrote him and told him I thought I could have it ratified.

Q. Isn't it a fact you told him there never was any question about this agreement being ratified?

A. What is the date?

Q. I am going to ask——

A. I wouldn't say I said that without reservation or without qualification. I might have said it but with reservation or some qualification. It is a cinch that if Joe Siciliano continued to be absent from Guam we would not like it.

Q. Whether you would like it or not isn't the question. I am asking if you told Mr. Turner.

A. I can't remember; it would be a matter of opinion, not an action of the board, if I said so.

Q. Let me read you something and ask you if this is your letter: "Last Monday"—dated October 9, 1952—"Last Monday my associates, Herbert Little and George Henrye, while discussing other matters in which we are interested, formally approved that agreement which I made with Joe Siciliano last June on Guam. [276] There never was any question about not approving the agreement, but I purposely refrained from having it formally approved ere now, because I thought it possible that the lack of approval might somehow some time help Joe in his troubles." Do you stand on that now, Mr. Thompson?

A. I did say that.

(Testimony of Edward Thompson.)

Q. Did you recite that?

A. I did because I could have forced the board to ratify it.

The Court: Now, just remember that you testified the board of directors in October refused to ratify it.

A. No, sir, I did not. I said on condition. They approved it on condition.

The Court: Now, this letter—

A. Was written afterward and at the time it was written I assumed Joe would be back on Guam within 60 days.

The Court: It doesn't say that. The letter says you had an informal meeting with the directors and they ratified it, not conditional.

Mr. Phelan: The resolution is in evidence.

The Court: The resolution is in evidence, so is the letter. This letter is being introduced for the purpose of impeaching this witness. Now, if this Court is being deceived as to when the corporation took action on ratifying this agreement, it wants to know about it. [277]

Mr. Phelan: Well, I think the ratification was prior to the letter, which is in evidence, certified to by the secretary, and determines what the corporation did.

The Court: There is no evidence before me that Siciliano or anybody else ever received any information concerning this agreement and its ratification until this letter was brought out.

(Testimony of Edward Thompson.)

Mr. Phelan: I think it has been admitted in the pleadings that he received notice of that.

The Court: This notice?

Mr. Phelan: A copy of that resolution.

The Court: I want to see that letter. Now, this is perfectly clear and I wish that the defense would stop this fiction that the agreement was not known to the directors and ratified by the directors.

Mr. Phelan: If it please the Court, in paragraph 5 of our cross-complaint, we referred to that resolution of the board of directors on October 6, 1952, and in reply to our cross-complaint and counter-claim, the defendant admitted receiving that resolution.

The Court: It doesn't make any difference about the resolution. Your letter says that it's pretty much of a fiction. If they want to date it back or date it ahead or so forth—there never was any question about the ratification. Now, the defense cannot contend—they never had any bona fide contention in October of resigning. Has he read the [278] letter?

Mr. Phelan: All I can say it is what the board of directors put in their resolution.

The Court: Well, you have the president of the corporation here. Let's forget about this fiction. I think that letter should be put in evidence.

Q. (By Mr. Bohn): I will ask you, Mr. Thompson, if you signed this letter to which we have just referred?

A. Yes, I signed it.

(Testimony of Edward Thompson.)

Mr. Bohn: I will now offer this letter as plaintiff's next in order.

The Court: Without objection, it will be received as Plaintiff's Exhibit 7.

Mr. Phelan: I would like for the record to object to the reception of it.

The Court: On what ground?

Mr. Phelan: On the ground it cannot be binding upon the corporation or the defendant. It is a personal letter written by the witness and it is outside the scope of his authority as president of the corporation.

The Court: Your objection will be noted.

Mr. Bohn: I have no further questions of this witness.

Mr. Phelan: I have a couple of questions.

Redirect Examination

By Mr. Phelan:

Q. Mr. Thompson, based upon the figures on profit, is it [279] possible for you to determine from those books that are here and available what the profit was period by period up to any definite period?

A. Not prior to 1953, July, because we haven't the books here. We have records in Seattle, but they are not here.

Q. I ask you, Mr. Thompson, did you write any other letters either to Mr. Siciliano or Mr. Turner concerning the return of Mr. Siciliano to Guam?

A. Oh, I wrote a number of letters to both, yes.

(Testimony of Edward Thompson.)

Q. Did you get a reply?

A. To Turner's I got maybe an occasional reply, but I was under the impression that Siciliano would be back before the end of 1953, that the case was practically settled.

Q. Where did you get that impression?

A. I got it from conversations with Siciliano and Mr. Turner. I think Mr. Turner wrote it. I am not quite sure about that. That is why I told him we thought 60 days would be ample, but if not, we could get the board to extend it.

Mr. Phelan: I have no further questions.

Mr. Bohn: No further questions, your Honor.

The Court: Just a moment, Mr. Thompson.

A. Yes, sir.

Examination by the Court

Q. Would it be correct to say that this operation, during the management of the Siciliano group was more successful than [280] under Norman Thompson's management?

A. Yes, because conditions on Guam have changed quite a bit, your Honor. Conditions are very bad now, your Honor. They have dropped off. We have had three different drops and competition is much greater now.

The Court: That would have no bearing on the relation of profit to gross?

A. Yes, it would, because the gross profit to sales is 65 cents to the dollar, but our rent, insurance—

(Testimony of Edward Thompson.)

The Court: I am thinking in terms of equal monthly sales.

A. Yes.

The Court: In other words, if you sold \$12,000 during the month of March, and there was a profit of 33 per cent, and you sold \$12,000 during the month of August in '53, and there was only a profit of half that much, you would think that the second management wasn't as efficient as the first, wouldn't you?

A. Or I would look for extraordinary items. For instance, we might get a big bill for legal expense or travel.

The Court: Yes, I appreciate that. We are thinking pretty much in terms of averages here. Now, you have testified that you put—what was it—\$26,000 into the new corporation?

A. No, sir, \$17,500. There is the \$5,000 open account. It could be collected tomorrow.

The Court: You put \$17,500 and that was 17 per cent of the outstanding capital? [281]

A. Of the outstanding capital.

The Court: After you had done that, do you recall how much money you had left in the corporation?

A. No, sir, I do not.

The Court: What I am wondering about actually is whether you used part of Mr. Siciliano's money to invest in that corporation?

A. I haven't the figures before me and I don't know, your Honor.

(Testimony of Edward Thompson.)

The Court: In any event, you never made any formal tender of any amount of money to Mr. Siciliano?

A. No, at that time we were prohibited. I left that to Mr. Little, who was secretary and counsel for the company. He knows more about those things than I do.

The Court: And as far as you know at this time, during the period the Siciliano interests were operating the Dairy Queen, all monies over and above local expenses were sent to you in Seattle?

A. Or accumulated here and, of course, the money that was sent to me was spent legitimately and duly accounted for.

The Court: Yes, I am still not quite clear as to the amounts. Have you tabulated the amounts?

Mr. Bohn: Yes, I had the exact figure. It was about \$118,000, as I recall.

The Court: Now, that is what throws me off. This is the [282] gross sales?

A. The gross sales were \$199,000.

Mr. Bohn: This was spread over the entire period from June 22 to November, or something, of '54?

The Court: I thought you were talking about money that Diza had sent?

Mr. Bohn: No, not the total amount. I have the exact figures here.

Mr. Phelan: Does that include the \$15,000?

Mr. Bohn: Yes, in that figure was \$7,500 which went back to Mr. Thompson, to which he was en-

(Testimony of Edward Thompson.)

titled as a debit. During the period of Siciliano's operation, Mr. Thompson was sent money in two forms: (1) by checks; (2) by bank drafts. I do not know the form which he was sent money since that time, but generally speaking, from my brief observation of the books, starting in September, '53, wasn't it?

The Court: It isn't material as long as I understand it includes more than the amounts——

Mr. Bohn: It covers the entire amount sent in by Diza.

Q. (By Mr. Bohn): Now, Mr. Thompson, before you and Siciliano entered into this agreement, you must have had some discussion as to how Siciliano was going to perform his managerial function?

A. I don't think we had a detailed discussion on it.

The Court: Did you understand he was going to have to [283] resort to the use of employees from his organization?

A. Yes, I understood he was going to have his employees in the store. We fired the Guamanians and put in his Filipinos.

The Court: How about the bookkeeping?

A. I don't think that was discussed at that time.

The Court: You left that up to Mr. Siciliano's discretion?

A. I think we did. The main thing was to manage the project.

The Court: Now, as an expert on this type of operation, Mr. Thompson, is it a fair statement that

(Testimony of Edward Thompson.)

as of the time the corporation took over this operation it had been conducted reasonably well and successfully?

A. Very successfully. The only two objections I had were I didn't get reports often enough, the reports were usually delayed, and we did not get those stores built. If Joe had been here they would have been done and, furthermore, if Joe Siciliano had been here, we wouldn't be hooked in that Guam Frozen Products either. He would have gotten a better location for us.

The Court: I think that clarifies this matter considerably. Now, you haven't put on any evidence as to your cross-complaint yet.

Mr. Phelan: I want to call Mr. Norman Thompson to identify the rest of the books, too.

The Court: Yes, would you appreciate a recess now? [284]

Mr. Phelan: Yes.

The Court: Very well, we will take a 15-minute recess.

(The Court recessed at 2:50 p.m., February 15, 1955, and reconvened at 3:10 p.m., February 15, 1955.)

Mr. Phelan: Mr. Norman Thompson.

MR. NORMAN THOMPSON

called as a witness by the defendant, was duly sworn and testified as follows:

Direct Examination

By Mr. Phelan:

Q. Will you please state your full name, occupation and residence?

A. Norman Thompson, P. O. Box 725, Agana, Guam, manager of Dairy Queen.

Q. Mr. Thompson, how long have you been manager of Dairy Queen?

A. Since April 22. It might have been shortly after that, but it was in April, 1953.

Q. Now, Mr. Thompson, are you the custodian of the books and records of the Dairy Queen?

A. Yes, I am.

Q. We have certain books that have been introduced in evidence already that were turned over to you. May I show this witness the exhibits as I want to introduce the other ones and I want him to know what we have got in? The big book, Cris. [285] Just the books of record. This has been introduced as a book of record. The monthly reports have been introduced, monthly statements and a voucher file. Now, when did you receive the records of the Dairy Queen?

A. May, probably around the 10th of May, 1953, when he gave them to me.

Q. What did they consist of?

A. This journal, a ledger, a letter file, some cash vouchers, some pamphlets from the National Trade

(Testimony of Norman Thompson.)

Association, meaning nothing, some letters from Mr. Edward Thompson, maybe something else, but I can't think what it is at the moment.

Q. Did you subsequently use other books in the business? A. How do you mean? Before this?

Q. After that.

A. Oh, yes; I think we started in July of 1954. We discontinued using this except for a sales record and started using another journal, a bound one, another ledger, journal vouchers, another system entirely than this.

Q. Now I may have something here that is not part of the corporate records. Will you please look at this and sort out those that are not part of the corporate records? I picked up a couple of files I am not sure of.

A. These are duplicates of these. They are the corporate records but they are duplications. This is just carbon copies of these. [286]

Q. Now, will you, one by one, identify those, please?

A. This is the ledger of American Pacific Dairy Products. This is the reconciliation of cash disbursements from the Seattle office with the receipts that were paid. This is our journal voucher file of American Pacific Dairy Products starting in August with a balance from July carried forward.

Q. The balance from July was carried forward in that book? A. Yes.

Q. May I ask you a question, Mr. Thompson?

(Testimony of Norman Thompson.)

Are any of these books that have to be referred to daily in the business?

A. Are these going to be introduced?

Q. I think they should be but I want them to have access to them to keep the business going. I don't want to put the business out. This is the journal?

A. The journal.

Q. The ledger?

A. Yes. The reconciliation of cash disbursements to the Seattle office.

Q. Now it seems to me we had a couple of other things introduced here.

The Court: You have the loose journal entries.

Mr. Phelan: Yes; has the court got those or has the clerk? What is that you want?

The Court: The loose journal entries.

Mr. Phelan: And the reports. This is the next one, Cris, [287] and this is the next one.

The Court: I have the reports here.

Q. (By Mr. Phelan): Now these are Defendant's Exhibit H and Defendant's Exhibit G. Do they cover any period after you assumed management? These reports cover the period right up to a month or so ago.

The Court: I don't show that late. Well, the top one will show.

Mr. Phelan: Yes; they run up to 1954.

A. I got the books one and a half months, one month and eight days after I came in the latter half of April so if you say my management started

(Testimony of Norman Thompson.)

the day I arrived on the 22nd of April, you have May in there?

Q. This covers up to May. It runs up through April and into May? A. Yes.

Q. Defendant's Exhibit G?

A. The same thing on this?

Q. Yes.

A. Clear up through the month of—we used the old journal of the Dairy Queen which we are now using solely for cash sales of the two stores, so it goes up to January 31.

Q. You keep a record of cash sales in that one?

A. Yes, but what it was originally intended for was a journal, Simplex journal system. We stopped using this back [288] in July. We discontinued using this back in July.

Q. 19— A. '53.

Q. Mr. Thompson, these monthly reports cover the entire period up to and including, I believe, the 30th of November, 1954. They were compiled from both sets of books?

A. Yes; just glancing, I think they do. I think they are in numerical order by months. I recognize mine and I imagine the ones before that or just prior—the early ones are signed by Henry Diza, so I imagine they are his.

Q. Which is the first one you signed?

A. Well, I didn't sign but I can tell mine. I don't sign these so I can't really tell you where mine started until I got my typewriter, but some of these were done in Pacific Bakery; I couldn't

(Testimony of Norman Thompson.)

tell. I can tell my type because I have the large type and these other reports, like February, 1952, were not done on my typewriter, but I couldn't swear to it. I would have to look at the working papers.

Q. Now, when did you first see these records?

A. These?

Q. Yes.

A. I think I came on April 22, 1953. I didn't do anything that day. April 23 I just glanced at them and I think I started working at them on the 24th.

Q. Where were these records? [289]

A. Various places throughout the office. The records you are showing me were in the office of Pacific Bakery. These were hither and yon throughout the office. None of these I did. This is just redoing these. No, it isn't—these are just journal vouchers. I did some of these so they couldn't have been in the office when I came.

Q. What months did you do in those? Are those journal vouchers?

A. Yes; starting in January in this one. I think that's in here. I started writing on the journal from my books by January 16, I think. I found a cablegram dated January 16 and put it in the books that date so I completed the January report.

Q. You completed the journal for the month of January?

A. Yes; then I went on.

Q. After January, who posted the books?

A. I continued to post from that date except

(Testimony of Norman Thompson.)

for the month of July when Dad was over here. I did January, February, March, April, May.

Q. So you tell us you came here toward the end of April and went back and posted in January the records of the business? A. Yes.

Q. May I ask you were any of the records posted before your arrival here?

A. Well, you can't post a record until you write up a journal voucher, and I was planning on spending some time in the [290] States but Dad hadn't received reports so he sent me out.

Q. You can't prepare a monthly statement until you get the journal finished? Where did you derive the documents from which you got the information to post?

A. Well, January—he had them in a folder, as I remember. February, some were in a folder, some were in envelopes. March, April, they were in envelopes on top of a filing cabinet. Some were attached to Pacific Enterprises' records. Journal vouchers—most of it was done in cash and some of them were bought for Dairy Queen at the time he bought things for Pacific Enterprises so I never did get those.

Q. You never did get those vouchers?

A. No; Henry Diza, the accountant at that time, said he would keep it and put in a note. I think he put in a note for cash. In one case I remember he did. I won't say he did many times but one case particularly because I asked him for the cash

(Testimony of Norman Thompson.)

voucher and he said he needed it. I said that was no way to keep books but I let it go.

Q. Now all these records were kept then up at the Pacific Bakery?

A. Yes. You mean at the time I arrived?

Q. Yes. When did you first go down to the store?

A. The day I arrived. About three hours after I got off the plane, I think.

Q. What time was that? [291]

A. I think right around noon or 1:00 o'clock.

Q. Would you describe conditions at the store?

A. I didn't look at it that day; I just went in.

Q. When did you first go to work?

A. I went the day after that. I was still unfamiliar with the help. I really didn't stop work at the store. I was anxious to get these reports finished so the store was open the night of the 23rd or 24th, I think. The next day I started working at the store when I got the key to the cash register and the safe from Henry. The trouble was at the time he was busy on the farm. Mr. Siciliano's books were behind on that, he said, so I didn't start working at the store but I got the two months' books out. I was down there the latter half of April at the store.

Q. Would you describe the condition of the store?

A. It was dirty. It wasn't the boys' fault. They are ignorant of a lot of what is necessary to keep the bacteria count down.

Mr. Bohn: I am going to object to the conclusion

(Testimony of Norman Thompson.)

of the witness. The question was, what were the conditions. I thought the answer was, "It was dirty," and anything further I ask to be excluded as not responsive to the question.

Mr. Phelan: I think it is responsive.

The Court: Now, what is the purpose of the question?

Mr. Phelan: One of our matters here is management. I [292] would like to know how this business with its equipment was—its standard of sanitation.

The Court: I think he is entitled to inquire as to what the condition of management was.

Mr. Bohn: I didn't intend my objection to reflect an objection on that point but only that the answer of the witness encompassing a judgment on various and sundry matters was not responsive to the question.

The Court: He said it was dirty. Let's go on from there.

Mr. Phelan: I can go into the details.

Q. (By Mr. Phelan): First of all, Mr. Thompson, how long have you been familiar with the management of that type of store?

A. 1948 I went into it with my father.

Q. Have you worked in a store?

A. I started at the bottom.

Q. Are you familiar with the equipment?

A. Very.

Q. Where did you get your experience?

(Testimony of Norman Thompson.)

A. I started at Olympia, Washington, June, 1948, I think.

Q. Have you held all the positions in the store?

A. Yes, I have.

Q. Now, you said in response to my question that the store was dirty? A. Yes.

Q. Will you describe what you mean? [293]

A. Well, ice cream making out on Guam—we have a vat to reconstitute the powdered mix with the mix we use in making ice cream. It is in a stainless steel vat as in the case of milk equipment. It had a large head gasket. Well, the boys didn't have a wrench to fit this since a crescent wrench would have to have a big head on it since there is no pressure behind it. Well, I asked him where the wrench was to take that off. He said, "We don't have a wrench." I said, "How do you get it off," and Tony said, "We don't take it off." I said, "What about the mix inside?" He said, "Oh, we wash thoroughly around here." So I finally dropped it that night and went to the blacksmith shop to have a wrench made to fit the nut, took it off and there was green mold enough to get under my fingers all around. I looked at Tony and said, "Do you call that clean?" He shook his head so I cleaned that and around the walls where they mopped every day. Instead of going the length of the walls, they mopped up to the walls so I had three boys spend two nights with a wire brush scraping out the dirt and crud that was four inches out from the wall into the latrine and sink. Some was about two feet

(Testimony of Norman Thompson.)

out from the wall so we scraped that off with a wire brush and those are the two main points I remember what I call a dirty store. The windows were clean.

Q. This stuff on the floor—do you remember what its composition was?

A. Whatever was spilled on the floor. It takes five months [294] to accumulate that at least. Whatever you spill—mix, topping or anything. Whenever they mopped it tended to build up on the side. It wasn't dust.

Q. How about the reefer holding cabinet?

A. Well, the walk-in cabinet when I got there was about 68. There wasn't a thermometer on it so I bought one and put it in. It was just about as warm as the weather, I thought. I tested it and it was 68. When we opened the business we brought out about two, but when I opened up the next morning it was 68 degrees in there. To keep mix from having a high bacteria count, unless it is in a vacuum, it should be down around 30 or 34 degrees so I asked him if the door was missing the rubber to keep the cold in. I walked up to Henry and I said, "The box isn't very cold." I didn't know any reefer men on the island; I had just been there about three days at that time. Nothing happened and the following morning we were taking a bacteria count and a Navy Chief came down and said we had a high bacteria count. I understood why because of what I had seen. So Henry came down and put a strip of canvas around the door and fixed the hinge so it would shut properly, but he didn't

(Testimony of Norman Thompson.)

put enough freezone in the compressor to chill the box. Dad gave me the reference of a man he knew, but he wasn't a refrigeration man and he wasn't anxious to do it, so I went to another man. There was a leak in the tubing which this other refrigeration man didn't fix, so I went back to the first refrigeration man my Dad had [295] suggested and he fixed the box pretty well, and we got it down to about 50 and by changing the expansion valve we got it down to 40 during the day. Even then when you opened up the large door—the store was not air-conditioned—the air would warm it up. Finally we changed motors and by using the compressor at night we got it down to 50 degrees. Naturally, the mix cannot chill as fast as the air, but we could chill the mix down at night to about 38 and if you open the door during the day it will go up, but not much. In other words, it takes longer for the mix to warm up than the air.

The Court: I want to clear up one point, Norman. When you speak of mix you are speaking of the ice cream already prepared?

A. No, your Honor; I am speaking of the mix when it is reconstituted from the powdered mix to raw mix before it goes in the freezer. So far I am in the back room of the store getting this mix. It is just like taking powdered milk.

The Court: It ceases to be powdered?

A. We add water to it at this point and then it goes to the freezers in the front room.

Q. (By Mr. Phelan): Now, will you tell me

(Testimony of Norman Thompson.)

about this bacteria count you said was being taken at that time?

A. Well, the chief came down with an Air Force corporal—I think his name was Chief—I am not very good at remembering names—but he came around every week for a long time. So he [296] said, “You have got a higher bacteria count here than you have had for a long time.”

Mr. Bohn: I object to this gentleman testifying to what somebody else said. It is hearsay. We have no opportunity to cross-examine the individual.

The Court: Well, I think that is hearsay so far. What, of course, the witness may testify to is his own knowledge. I presume he had tests made.

Q. (By Mr. Phelan): Did you ever see the bacteria count or report of it?

A. Yes, I saw the report.

Q. The laboratory report?

A. Yes; I think the Air Force or the Navy was going out and picking up samples and the Government of Guam was taking it with the aid of another serviceman at the Guam Memorial Hospital and they continued doing that for some time. Then they stopped doing it and now it is strictly the Government of Guam.

Q. The Government of Guam regularly makes those tests now? A. Yes; now they do.

Q. Now, just for the purpose of the record, may I brief your report as to what I think the procedure is and will you correct me? The mix comes in a powdered form. It is mixed in a certain way with

(Testimony of Norman Thompson.)

water, chilled and agitated so it won't separate and put into another machine for freezing with flavor in it. Is that the process? [297]

A. Almost. You put the water in first at night so the water will be cold or cool which you add the mix. Otherwise you would already have bacteria so you chill the water first. We chill the water, add the mix, then add the flavoring.

Q. Now, when you came to Guam, where were your supplies stored? A. Pacific Bakery.

Q. Would you describe that? Did you inspect that?

A. Not for some time I didn't. I think I went up there the second or third week. They had the room locked so I couldn't get in until I knew some of the boys. I only knew Henry at that time.

Q. When you got in would you describe the condition of the materials up there?

A. Well, they weren't rotating the containers. I found—

Q. Containers, you say?

A. Yes, sir; you see when supplies come in you pile them on top and then you get them from the top and judging by the number and conditions of the boxes in the far corner when I finally did move it out, it had been there from the time we opened and I guessed it had been there much longer than the stock in front.

Q. Let me ask you this, Mr. Thompson: This prepared mix that comes out from the States in

(Testimony of Norman Thompson.)

drums is that a staple product or has it a period of time in which it should be used? [298]

A. Oh, it is considered staple, but it has a period of time—approximately six months not in direct sun, but if you stored it in here, it would last maybe six months.

Q. Now, at the end of six months, what happens to it? Does it get unfit for use or change or what?

A. I have never kept a drum six months to find out, but I think it would turn sour, the same way as malt. It has the same ingredients in the base and malt will turn sour if you leave it unsealed and out in the open.

Q. Now, when you came to Guam and took over the books, would you describe the way cash was being handled, of your own knowledge?

A. Well, I came to Guam and the cash was kept in a safe besides Henry Diza's desk in the office of Pacific Enterprises.

Q. How big a safe?

A. Oh, about three and a half feet—I am guessing. I haven't seen it for a long time. Maybe it was three and a half by three feet by three and a half feet.

Q. It was being kept there. Was that just Dairy Queen cash or what?

A. Oh, no; I saw him counting cash and putting it inside and I didn't think anything of it the first day I came. I thought, "Boy, that was a lot of cash." There was a lot of it. Joe Meggo would bring

(Testimony of Norman Thompson.)

it from the Talk of the Town at night. He just kept it in there and I found out after I reconciled [299] the bank account and cash on hand that our money was in the safe also.

Q. How much was turned over to you?

A. I don't remember. I made a deposit the first day but I can't remember the figure. It was a couple of thousand dollars. The next day I deposited 4, 5, or \$6,000. The next day I must have taken out 6 or \$7,000 out of that safe; I am guessing.

Q. The first one or two deposits in the Bank of America would represent the receipts for those days less the cash taken out for change plus what was turned over to you?

A. I don't follow you.

Q. You said you made a couple of deposits?

A. Yes.

Q. What did that represent? The money that was in the safe?

A. That represents the money in the safe plus the sales. When I came here they hadn't deposited for several days so it would be that money—some of the money I found in the safe—or maybe it was just the money before that second day I started working on the reconciliation and there was some money plus the sales of two days. I was working on the books.

Q. You mean Henry Diza didn't turn over to you all the money of the Dairy Queen?

A. No; because we were reconciling the books. It took him two days looking for receipts. I was

(Testimony of Norman Thompson.)

working on the books to find out how much we were short. [300]

Q. Do you know whether or not Mr. Henry Diza had that money segregated in the safe?

A. I don't know. I don't know how he was handling that. He might have or he might not. I didn't watch him to see how he was drawing it out.

Q. You got here when?

A. About April 22.

Q. And I believe you told me you started posting the records of Dairy Queen back in the first part of January?

A. The journal when I came—the sales were written up by Henry—I believe Henry or somebody in Mr. Siciliano's office—up to the 17th of April so I started on the books when I arrived on the 22nd.

Q. That is what you said?

A. I must have started working in the office on the 24th or 25th. I started in the office working on the sales.

Q. Up to the 17th you said there was a record of daily sales? A. Yes, in the book.

Q. Now, what is that? What records did you start posting from some time in January?

A. Those were the sales. They were in there but none of the payrolls. They weren't in and the tax wasn't shown. I mean the entries in the journal—vouchers hadn't been posted. In February some of the invoices hadn't been opened or letters [301] yet. One or two in March. I remember he was open-

(Testimony of Norman Thompson.)

ing letters, pulling out invoices that Dad had sent him.

Q. That had not been opened?

A. (Shakes head.)

Q. Now, some time during the period 24th or 25th of April to the end of the following week, these reconciliations were made and funds turned over to you and you deposited those funds in the bank?

A. Yes; the first deposit I made was around the 27th, I think. Somewhere around there; I would have to check.

Q. Now, the bank book would correctly reflect that?

A. After the time I came here it would, and I believe it would before.

Q. Would reflect the deposits? A. Yes.

Q. Now, you started to go to work down in the store a couple of days after you got here?

A. Yes.

Q. Was the cash register being used and equipped to use tape?

A. No; it was not. I think they took a reading off it at night by taking a tape. It wouldn't total. They would put a slip of paper in there and hand operate it down there to get the total. On the automatic register that you see now the daily sales are rung up and given to the customer. The roll of tape [302] was not in the cash register but at the end of the day he cut a piece of the tape, put it in there and took the total off it.

(Testimony of Norman Thompson.)

Q. Was that just—

A. It was a daily total, the cumulative sales. It would do that but only up to \$999.99, I think.

Q. You could clear the machine? A. Yes.

Q. Were you furnished with any of those reports?

A. I asked Henry when I came here. I asked where the sales from the 17th, 18, 19, 20, 21 and 22 were. He told me they were around somewhere. He couldn't find them. He was taking a daily inventory at that time, meaning that any supplies in the back room which were brought out to the front room, the boys would mark them down on a piece of paper and at the end of the day the totals should agree with this. I said, "What about those daily inventories, we can check them on that." He didn't have them and I had so much money here in my hand and I was missing four or five daily sales so I gave the money between those days until I ran out of money in my hand. He couldn't find any records so I just took the amount of money and spread it out between those four or five days of sales.

Q. Those were on the daily sales. Now, what other vouchers did he use—did he make available to you for posting that you did for that period before you came to Guam?

A. Oh, I think he gave me enough. I couldn't put anything [303] in the books I didn't have a record for. He showed me that some of these were attached to Pacific Enterprises books, I believe. It

(Testimony of Norman Thompson.)

has been a long time. I saw everything I put in these books as far as receipts.

Q. And you can tell which are your entries because they are in your handwriting?

A. Oh, yes.

Q. And for everything in your handwriting he showed you a voucher?

A. Yes; he showed it to me.

Q. Now, with the exception of the daily sales, cash receipts, which you said for several days you had no reading—

A. Yes.

Q. The daily sales were posted, you testified, up to, I believe, the 16th or 17th of April?

A. Well, I know they were posted for the 17th of April. I can see his handwriting. They were posted through the 17th.

Q. Now the other records in that book—were they all evenly posted up to a certain day in January or to varying dates? Can you tell?

A. The entries in the journal were posted by Henry up to the 16th of January, and, of course, the sales.

Q. So he had posted all accounts—

A. He had made journal entries up to the 16th of January, to the 17th and he had kept a record of cash receipts of the store, [304] of the gross sales.

Q. Now, would the cash receipts and gross sales differ?

A. Cash receipts?

Q. Would that represent anything except cash that came out of the cash register?

(Testimony of Norman Thompson.)

A. No; he never entered any of the wholesale accounts we had. In fact, he didn't even send them a bill, I think, until I arrived, but that was the only other income of cash we had so the cash receipts and the amount of sales would have been strictly out of the cash register.

Q. Now when you came to Guam I understand that there was an "L" on the building of the Dairy Queen, an extension? A. Yes, sir.

Q. Would you describe that extension? Give us the physical layout.

A. It's attached to either side of the Dairy Queen store, the original Dairy Queen store as I saw a picture. It's 12 feet in width, maybe 30 foot long—31 foot—I measured it once. And it was divided down lengthwise by a partition with a large door at the farthest corner. Then on the back—that you cannot see from Marine Drive—in the center of that extension there is a double door. They had serving counters cut out similar or exactly to the type that are in the original store. Above that was one pane of glass, above each of the two serving counters, up to the wall in the same design as Dairy Queen store [305] with frames for large windows but the windows were not in. It has a cement deck and it is made mostly out of reefer panels. The sales room has acoustic tile and the back room has—oh, I don't know—some other type of material. It is not acoustic tile—plyboard or something like that—gypsum board.

(Testimony of Norman Thompson.)

Q. Would you describe the plumbing and electrical installations in there, if any?

A. The electrical installations amounted to 1, 2, 3, 4 ceiling lamps, light sockets, I mean. There were two switches and about eight outlets, all of which were 110 volts. They had a 30 amp. fuse box in with about six fuses in it. I think six or eight fuses. Plumbing consisted of two pipes coming out of the wall at about sink height with drain pipes sticking out. The hot water pipe and cold water pipe were plugged off. Then in back of this extension in the back room there is an iron pipe, two inches in diameter, an inch and a half in diameter, coming out of the floor about three feet, four feet, and I haven't found the use of that yet. I am using it to hang things on. It is still there, but I think it is connected with the plumbing in some way. The plumbing pipe goes out that way at the same angle, but I don't know what it's for.

Q. What type of floor?

A. Concrete floor, cement, which I remember was very absorbent to water. It would rain in there and it would just absorb the water—the cement [306] floor.

Q. It was porous?

A. Porous.

Q. And this extension was not out flush with the front of the building?

A. No; it started about where—speaking of the original store—where the sales room back wall started. The extension came out just about there.

(Testimony of Norman Thompson.)

Q. So the front part of the store is recessed that much back?

A. Yes. It almost started behind the sales room.

Q. Now, Mr. Thompson, when you became familiar with these books was there anything in those books reflecting that addition to that building?

A. No; I went through them a couple of months before I came here and I have never seen anything. It doesn't take long to go through the books, but I have found nothing unless it is charged off to PCC or something, but I haven't found anything.

Q. You found no reference to that extension in the books? A. No.

Q. Did you ever come across any vouchers with respect to that extension? A. No.

Q. Now, Mr. Thompson, you are now keeping the books of the Dairy Queen? [307]

A. Yes; I am.

Q. How much time does it take you in the course of a month to keep those books?

A. If I started off and had to do it, I could do it in eight hours from the time the month closed if I didn't do anything until the end of the month and I had to do it, I could do it in eight hours—that is to the final typing.

Q. Does that mean posting every necessary entry during the month?

A. Yes; if this type of book was continued in use, I could do it in about an hour and a half. We have a more complex bookkeeping system than they had.

(Testimony of Norman Thompson.)

Q. Now, from your testimony, Mr. Thompson, you stated that the journal vouchers were not completely posted after the month of December, 1952? You had to make some entries in January, '53, is that what you testified?

Mr. Bohm: I don't want to interrupt but it seems to me we have gone over this several times before. The dates were perfectly clear as to this.

Mr. Phelan: I am not trying to repeat the testimony. I want to get started on another question.

The Court: What was your question, Mr. Phelan?

Mr. Phelan: That the journal vouchers were not complete starting with the month of January, 1953, and that he posted from there on. I want to be sure I am not asking him the wrong [308] question.

The Court: Well, I think we have to assume that the evidence is not in dispute as to the accuracy of his reports up until the time that Mr. Thompson took over.

Mr. Phelan: Well, I am trying to arrive at the first report that had to be prepared by Mr. Thompson. I think the first month he did any work on the books was January, 1953.

The Court: Now he couldn't have prepared the report, of course, prior to April of 1953.

Mr. Phelan: He has testified already that he had to prepare some of the statements before that and I want to, by process of elimination, find out whether the first one was the January statement or the February statement.

(Testimony of Norman Thompson.)

The Court: We are talking about two different things. These are reports?

Mr. Phelan: Yes. The reports had to be based upon those books and what I am trying to find out is the last complete month a statement could have been prepared without him doing any posting, because he didn't prepare that statement.

The Court: Well, I don't see what purpose it would serve if they weren't posted. They are posted now.

Mr. Phelan: They are posted now. I am trying to get him to identify the first statement that he, himself, actually prepared. He would have knowledge of that statement himself.

The Court: Well, why don't we ask him [309] then?

Mr. Phelan: I am trying to.

Q. (By Mr. Phelan): Which was the first month for which you prepared a statement?

A. January, 1953, was the first financial statement I prepared.

The Court: January of '53?

A. Yes, your Honor.

Mr. Phelan: Will you find it for me there?

The Court: That would be for the statement ending December 31 or January 31?

A. The statement ending December 31 was prepared, your Honor, when I arrived on Guam.

The Court: And you prepared all the statements from that time forward?

(Testimony of Norman Thompson.)

A. Yes, your Honor. Here is your place. That is what was done—this is what I have done.

Q. (By Mr. Phelan): So the statement ending for the calendar year 1952 was prepared by Mr. Diza?

Mr. Bohn: If your Honor please, I do not understand that there was any substantial conflict at the time of testimony regarding these statements nor as to their accuracy.

The Court: I think what Mr. Phelan is trying to bring out is that even during the period from January, at least, to April that you hadn't done the job.

Mr. Bohn: That we hadn't prepared [310] statements.

The Court: Hadn't prepared the statements, yes. So far as the statements go, they were admitted, but it was my impression that they had been prepared by Mr. Diza.

Mr. Bohn: I just don't know.

Q. (By Mr. Phelan): You were furnished with the prepared statement ending with the 31st day of December, 1952, when you came here? They were there? A. They were there, yes.

Q. From then on you prepared them all?

A. Yes.

Q. Now, the entries in these statements are backed up by vouchers and by books? A. Yes.

Q. The books were not posted for the first part of 1953? A. No.

(Testimony of Norman Thompson.)

Mr. Phelan: I have no other questions at this time.

Cross-Examination

By Mr. Bohn:

Q. Now, Mr. Thompson, you came out to Guam in April, the 22nd, is that correct, of 1953?

A. That is correct.

Q. Had you ever been in Guam before?

A. Never before.

Q. Had you any familiarity with business conditions in Guam? [311]

A. Some, yes.

Q. How did you obtain that familiarity?

A. From my father, also from speaking to friends in Japan. At the time I took the job they mentioned the fact——

Q. What did you come out to Guam to do?

A. Manage the Dairy Queen store.

Q. Isn't it a fact that you came to Guam to help out in both Pacific Enterprises and Dairy Queen?

A. No; I took the job solely on the basis of running the Dairy Queen of Guam.

Q. Isn't it a fact you told Henry Diza that you were here to help him not only with the work of Dairy Queen but with Pacific Enterprises and to help out in the general operation?

A. No; I didn't tell him that.

Q. You never told anybody that?

A. No; I didn't.

Q. How long did you work up at Pacific Enterprises with Henry Diza?

(Testimony of Norman Thompson.)

A. I think it must have been from one week to two weeks, I think.

Q. Could it have been as long as one month you worked up there?

A. I would have to find out. The only way I could check on that as to accuracy is through my letters home. I told when I quit working there and the other check is the warehouse—when [312] I quit working.

Q. Could that be as long as 30 days after you came to the island?

A. Right now I don't think it could be but time flies out here.

Q. What did you use as headquarters after you left Pacific Bakery?

A. Jim Butler's bachelor quarters. It is behind the Coca-Cola plant. There was a desk in there. When my car arrived I had an adding machine and typewriter in it and I set them up there.

Q. How long were you there?

A. I lived up there until November, '53, fall of '53 or winter, but before that I had moved the desk down to the Dairy Queen of Guam.

Q. And the space you used in the Dairy Queen of Guam is the extension you have been talking about?

A. Part of it, yes.

Q. Where you put the desk. When did you start living down there in this extension?

A. I think it was around November or December. I think I moved in before Christmas.

Q. Of 1953?

A. What is this, '55 now?

(Testimony of Norman Thompson.)

Q. Yes. [313]

A. I think I have lived down there a year.

Q. Well, if you moved there in '53 it would be in excess of a year?

A. Yes; I think I was down there for Christmas of '53, I think.

Q. Prior to that time you had been using this space as an office?

A. Oh, I still continue to use that. Oh, I remember—I started closing in the outer space on Labor Day. Is that in September? It shouldn't have taken me over a month down there.

Q. So you started living there in November and are still living there? A. Yes.

Q. And still using it as an office? A. Yes.

Q. How frequently is that store inspected by the Government of Guam or any other inspecting agency?

A. Up to about a month ago, a month and a half, it was inspected every month at approximately 1:30, but lately every other week but now they are back to every week again. For awhile they got snowed under around the Christmas holidays.

Q. So roughly you are inspected every week?

A. Yes.

Q. They inspected before you arrived?

A. I imagine they did. [314]

Q. And those inspections—you observed them? They took the bacteria count?

A. They took the ice cream from the store.

Q. They generally checked for cleanliness in the

(Testimony of Norman Thompson.)

store? A. Yes; they do.

Q. And as far as you know they made exactly the same checks before you got here? A. Yes.

Q. Do you think the Air Force or anybody else would have allowed this business to continue with five months' accumulation of filth on the floor?

Mr. Phelan: I think that is a conclusion.

Q. (By Mr. Bohn): In your experience would the Air Force allow you to have five months' accumulation of dirt on the floor? A. It didn't.

Q. Now you said that you first started in this business in 1948. When did you enter the Army?

A. April, 1951.

Q. And you were in the Army until when?

A. I got out, I think, April 12, '53. No, that couldn't be possible. Let's see—I have the record here, I think. I honestly don't know. I was in in September, I know that.

The Court: How long did you serve?

A. I served 23 months, I think, your Honor. I got out a month early. [315]

The Court: Well, did you get out approximately in April of 1951?

A. No; I was out, I think I got out the 12th of April, 1953—just before I came over here, your Honor.

The Court: Well, that is close enough. You went in in April, 1951, and got out in April, '53?

Q. (By Mr. Bohn): This was the first job you had after you got out of the Army? A. Yes.

(Testimony of Norman Thompson.)

Q. When did your father first promise you this job out here?

A. He didn't promise. He offered it to me shortly after I came back. In January I think he asked me if I would like to come to Guam.

Q. Of what year? A. '53.

Q. He never discussed it with you before?

A. He discussed it with me in '50, I think. Then the war broke out and he quit then.

Q. Wasn't it the plan for years that you would come over here and come to Guam?

A. There were a lot of plans for me—one to go to Minnesota. My brother took that out.

Q. What is your brother's name?

A. Skip Thompson—Edward Thompson, Jr.

Q. Guam was mentioned?

A. Yes, it was mentioned.

Q. When you got out of the Army your father offered you the job and you accepted it?

A. Before I got out of the Army I was in Japan and he offered it to me then.

Q. Now I want to show you the financial report for the month of April, or perhaps you can find it for the month of April, 1953, and can you tell what the gross sales and what the profit was in that month?

A. April of '53—April 30, '53, \$30,823.04.

Q. Could you quickly give us the profit? My figures show the sales for that month.

A. It shows the sales here.

Q. And the profit?

(Testimony of Norman Thompson.)

The Court: The profit doesn't show on that. Let's just take it from the report.

A. Sales for April were \$81,361.03.

Q. Now that is about when you said you found everything operating so badly, is that right?

A. Yes; that is the month I arrived.

Q. And things were operating badly, in your judgment? At least dirty and messed up?

A. Oh, yes; definitely. The month I took over I went over it. A month after that I almost made the highest sales [317] on Guam, which was over \$10,000. May I made \$9,000—August, I made \$8,300.

Q. All right, that is enough. You have answered my questions certainly. How much profit did you make from those sales?

A. I could figure it out.

Q. Well, for one month.

A. The month of May I had \$91,806.67—

Q. What was your profits? A. \$31,403.47.

Q. I mean for the month?

A. Well, simple subtraction—

The Court: Just give us an approximation.

A. About \$800, I think—\$700, according to the reports.

Q. (By Mr. Bohn): About \$700 in profit for this month out of \$9,000 gross? What was the monthly profit in April, the month you thought was so bad?

A. I am trying to find a date. Here it is. \$1,487, I think, by the reports.

(Testimony of Norman Thompson.)

Q. So the business made \$1,487 in April on \$8,299 gross and \$700 in May on a gross of over \$9,000, is that substantially your testimony?

A. No; it isn't because when I arrived here Henry had not charged insurance for some time. I wrote Dad and asked him about it and he said put it in that month, I think. I have not [318] checked this thoroughly. That is about right and, of course, in April I drew a salary also which had not been included before.

Q. But you made substantially less profit in May, is that not correct?

A. By these reports, yes, but whether this is the actual profit, I couldn't tell you.

Q. Now, you mentioned something about a new bookkeeping system that you installed. Where is your general ledger?

A. I believe it is over on the gentleman's desk over there.

Mr. Bohn: May I have that bound volume; that one right there?

Q. (By Mr. Bohn): Now, is this now your ledger? A. It is.

Q. Is that exactly the same book, cover, rather, that was handed to you by Mr. Diza?

A. I couldn't swear to that, but I imagine it was.

Q. Did you buy one yourself? A. Yes.

Q. You did? A. Yes.

Q. Where is that? A. In the safe.

Q. What records do you keep in that?

(Testimony of Norman Thompson.)

A. It is in the safe. It has journal vouchers in it but—— [319]

Q. As a matter of fact, isn't that the one he gave you, Mr. Thompson? A. I think it is.

Q. You are now using that as a general ledger?

A. Yes.

Q. Isn't it a fact that when he handed it over to you it was also used as a general ledger?

A. Yes.

Q. Was it posted?

A. Yes; it was posted up through December of 1952.

Q. Where are those postings? Where are the postings that Henry Diza made in that book?

A. No, sir; when I restarted the books, I took them out. I put them around the office, put them in boxes or around and they kicked around there and I think I eventually lost them.

Q. Let's talk about these reports. Do you have any bookkeeping training, Mr. Thompson?

A. Yes.

Q. How much?

A. I went through Edison Technical School, a year and a half of bookkeeping and trained under Dad for two years, who is a C.P.A.

Q. Now, you have kept the records in good shape since you have taken over?

A. I think so. [320]

Q. Please point out to me the records for June, 1953.

A. They are not in this book. At that time Dad

(Testimony of Norman Thompson.)

was over here and he was doing the bookkeeping at this time. Consequently he found the records in such bad shape he said, "There is no sense doing June if we have to rewrite the books," so he took them with him and made a few small entries in July and set up the new books.

Q. At that time you personally had been making entries for two or three months?

A. Yes; I can only follow—I am not a C.P.A.—from the point the other man left off. Henry or the person who set up these books made such large errors in the beginning.

Q. Point them out to me here.

A. Organization expense, which is \$5,000, should not have been set up as organization expense.

Q. Will you find that entry for me, please?

A. He has it down as \$10,000.

Q. What month is that?

A. June 22 to November 30, 1952, so this would be the November 30 statement, 1952.

Q. Those were all sent to your father, weren't they?

A. I really don't know. You might ask him. I was in Japan.

Q. While you were running the business, didn't your father receive these and correct them and send them back as he received [321] them?

A. He wrote me when he offered me the job that the reports were not coming through so I don't know which ones he received.

Q. Was it his habit to correct these after he

(Testimony of Norman Thompson.)

received these reports? A. From me?

Q. Yes.

A. He never sent a report back to me. They were correct when I sent them to him.

Q. I call your attention to the report for July, 1953. First, let's take a look at the month of August, 1953. There are a lot of corrections on that report. Will you tell me who made them?

A. I did.

Q. You did? A. Yes, sir.

Q. Was it the result of any instructions from your father?

A. I don't think so. Sometimes on a profit and loss statement I finish that completely and then I will go back and the thing won't balance when I make the final financial report.

Q. So you didn't receive any instructions from your father on that?

A. I haven't that good a memory.

Q. Do you have any files on it?

A. No; I do not. [322]

Q. Do you maintain an office correspondence file of your correspondence with the home office?

A. Yes.

Q. You didn't bring it with you today?

A. Oh, no.

Q. Would that indicate whether your father gave you any instructions on that?

A. No, sir; some of them were personal letters.

Q. Where are they?

A. I don't keep personal letters. It might be he

(Testimony of Norman Thompson.)

corrected me; I don't know. If I had the time I could find where the error was.

Q. Let's take the month of July, 1953. You will find on that report a notation that reads as follows: "Surplus using your figures." What does that mean?

A. I can't even find the report.

Q. What does that mean?

A. Dad was beginning to set up the books and he was beginning to change his books so he wouldn't spend so much time on Guam to correct me, so in order to make my books balance with his, he sent me the figure for surplus he put in and arrived at.

Q. So that particular month he corrected you?

A. Yes, and it probably happened several other months during the time I was working on the books Henry Diza worked on. [323]

Q. What do you carry your franchise value as in those books at the present time?

A. \$15,057.61.

Q. \$15,000. And where does that figure come from?

A. It derives, I believe, less depreciation, from what the franchise cost the corporation.

Q. From whom did the corporation buy that franchise?

A. I think I heard Dad say he sold it to them.

Q. In other words, the corporation bought the franchise from your father?

A. I don't know. You could ask him.

Q. And when was that figure changed? Has that

(Testimony of Norman Thompson.)

figure always been carried on the books at the same price?

A. May I see those—I could tell you.

The Court: What franchise is this, Mr. Bohn?

Mr. Bohn: Franchise for the use of the equipment.

A. I don't even see it. I don't seem to see it, to tell you the truth.

Q. Well, when did the franchise appear in the books, the value of the franchise at any figure and where did it come from?

A. I seem to find it first in July.

Q. In other words, the first time you find any valuation placed on the franchise is in July, '53, is that right?

A. That's probably it, but it doesn't check with that.

Q. Do you have any entries in that ledger for July? [324]

A. I have not but I was trying to check to see if the last one—I started in August bringing the balance forward from July, you see.

Q. You found no entries for July at all?

A. Just the amount carried forward.

Q. Now, do you find any amounts in your general ledger for June?

A. Those were Henry Diza's.

Q. Who kept the ledger in June, '53?

A. That was the time Dad was changing the books over.

Q. Who made the entries?

(Testimony of Norman Thompson.)

A. There is no entries in this.

Q. Who made the ledger entries whenever they were made in June, '53?

A. I did not. My father was out here working on the books at that time.

Q. He already testified he didn't make them. There are no entries for June as far as you know?

A. That is right.

Q. Let's check the cash books. What was the last entry you made after May 30 in this book?

A. August.

Q. August. So there are no entries in the cash book between May 30 and August?

A. That is correct. [325]

Q. Where are those entries?

A. I type them on a different sheet of paper after I file them in here.

Q. Where are they?

A. In the office, I believe.

Q. Do you have reports for the months of June and July? I mean the entries.

A. Cash.

Q. You just have cash register receipts?

A. That is all these are.

Q. But they are entered from that record in the book?

A. Yes.

Q. But you didn't make up such entries for June?

A. Not unless I did it somewhere else.

Q. Did you make such entries on a personal record for July?

A. The same applies to that month as for June.

Q. You just didn't do it—didn't make it?

(Testimony of Norman Thompson.)

A. I won't say that—it slips my mind if I did, though.

Q. If you did where would they be?

A. They might be at the office. If this is the permanent book, this is the only place to make them.

Q. So they weren't made?

A. It slips my mind.

Q. And you have got entries in for every month from August [326] to when?

A. What did I say? January of this year; I think I said January this year—through January of this year.

Q. That is from August of '53 to January of '55?

A. That is correct.

Q. You have none for June or July?

A. No, sir.

Q. And you can't explain why?

A. Yes, I can explain again—these books were being worked on by Dad, changing over and I did not have that book in my possession for that month.

Q. Or for two months?

A. See, he already made the entries for July here.

Q. Do you have cash receipts and cash disbursements in July?

A. Not cash received, no, I do not, but I see entries here not in my handwriting.

Q. Now he was changing over to another book-keeping system. Will you find for me in the other book the entries for June and July, 1953?

A. They aren't there.

Q. To the best of your knowledge they weren't

(Testimony of Norman Thompson.)

made, is that correct? A. It might be.

Mr. Bohn: I have no further questions. [327]

Redirect Examination

By Mr. Phelan:

Q. Mr. Thompson, was any record kept of cash coming in during the months of June and July?

A. Oh, certainly.

Q. Did you deposit cash in the bank?

A. Certainly.

Q. Did you pay bills during that period?

A. Yes, I wrote checks.

Q. Did you keep a record of obligations you incurred? A. Oh, certainly.

Q. Do you have the supporting vouchers?

A. Yes.

Q. All of them? A. I think so, yes.

Q. That was the period when you were changing from one system of books to another and changing your fiscal year on a reporting basis?

A. Yes, August was our fiscal year.

Q. But you were keeping records of what you did? A. Oh, certainly.

Q. Not in these books?

The Court: Where are the records?

A. In the office.

The Court: They weren't subpoenaed? [328]

Mr. Bohn: At my request, in order to avoid issuing a subpoena, Mr. Phelan said he would bring the books.

(Testimony of Norman Thompson.)

Mr. Phelan: I didn't know the supporting vouchers weren't there. I would be glad to bring the supporting vouchers.

The Court: I don't see anything so mysterious about the missing cash records since the business indicates it didn't vary more than a \$1,000 or so a month.

Mr. Bohn: If your Honor please, my point in asking the questions was that I don't know what transpired during those two months and they may well be able to account for them, but to me it well behooves individuals who criticize others for accurate record keeping to have every set of books of record brought before this court and discussed. We have two full months when not a single substantial entry has been made and further a whole series of written reports for two years and two full months for which they are not made. It may very well be they can explain it, but it is not explained yet.

Mr. Phelan: Now counsel has testified. May we bring those vouchers in tomorrow morning, your Honor?

The Court: I don't know that it is important, actually. I think I have a pretty good picture of what transpired. I think you should put them in the record, certainly. The defendant was so highly insistent upon having every scrap of information that could be made available when the management was in Siciliano, and certainly in turn Siciliano has a right to every [329] scrap of information you have available.

(Testimony of Norman Thompson.)

Mr. Phelan: I am not the bookkeeper.

The Court: The testimony of this witness is he has vouchers showing the transactions of this business during June and July and we will expect them tomorrow morning.

Mr. Phelan: They may not be posted but—

The Court: Well, whatever records there are.

Q. (By Mr. Phelan): Now, Mr. Thompson, you were asked on these reports about differences in profit for two months—I believe July and August of 1953—am I correct in that? A. Yes.

Q. I would like to also ask a couple of questions.

The Court: He was asked as to the discrepancy between \$700 profit in approximately August as against \$1,400 profit in May, I believe.

Mr. Phelan: I think the months were April and May, your Honor—the two months.

The Court: Well, it seems to me he explained that by saying that in the first place there was the \$500 salary and in the second place he thought there were cumulative insurance bills.

Q. (By Mr. Phelan): Now at this time in the month of April, 1953, the net profit that was reported on the profit and loss statement was the net profit covering what period? Can you tell me that?

A. On this report you are showing me? [330]

Q. Um huh. Is that a cumulative net profit?

A. Yes.

Q. If so, from what date, please?

A. June 22, 1952, to April 30, 1953.

(Testimony of Norman Thompson.)

Q. Now, Mr. Thompson, what is the cumulative net profit on the next month?

A. The next month was——?

Q. May. A. May 31, 1953, \$31,403.47.

Q. A difference, roughly, of 7 or \$800. Now have you got a cumulative total of expenses?

A. Yes, in April expenses were \$19,156.31. In May they were \$23,366.66.

The Court: How much?

A. \$19,156.31 in April and——

The Court: Pardon me—you mean thousand or do you mean hundred?

Mr. Phelan: They were cumulative from the start.

A. From June 22, 1952, to April 30, 1953, they were \$19,156.31 and in May, 1953, covering the same period, they were \$23,366.66, according to these reports.

Q. (By Mr. Phelan): Can you explain that substantial increase?

A. Depreciation on the building went up \$700. Depreciation on heavy equipment went up \$500. Car rental was \$100. I am [331] speaking of May over April. Wages and salaries that month were \$1,500 more. I believe that is due to travel out here. My plane ticket was placed in wages.

The Court: Well, now these speak for themselves.

Mr. Phelan: I am just trying to get that point in the record because apparently Mr. Bohn stressed so greatly the two months were about equal.

(Testimony of Norman Thompson.)

The Court: You are all dealing with a false conception because the plaintiff talks about profits. On the other hand the plaintiff has an action in here for the purpose of reducing that alleged profit by at least 50 per cent, so we are not talking about profit. I mean we have so many factors here that go to confuse the eventual issue. I don't know yet where this \$4,000 came from to put up an extension. I don't know whether any money was paid for that extension. Do you know?

A. No, when I came it was up. It wasn't in our books.

Mr. Bohn: It is not paid; it is part of the other action.

The Court: Then if it is charged against the business it comes out of profit.

Mr. Bohn: We take the position it is an increase of capitalization, not an operational expense at all.

The Court: It has to be paid for. How, if not against profit?

Mr. Bohn: On the other hand it is offset——

The Court: That may be correct, but you are asking for [332] \$4,000 out of what they have and give it to you. I don't care where they get it. They have \$4,000 left——

Mr. Bohn: But they have an offsetting value.

The Court: Well, you can't spend an offsetting value. It comes from profit and loss.

Mr. Bohn: Well, it comes out after depreciation.

The Court: They may increase their book value \$4,000.

(Testimony of Norman Thompson.)

Mr. Bohn: And then pick it up on income tax depreciation schedules, deducting a percentage.

The Court: But the fact remains, Mr. Bohn, they have not added it to their capital account and you say they owe you \$4,000. Now if they owe you \$4,000 it has to come out of profit; it can't come out of anything else.

Mr. Bohn: Well, the cash would come from cash on hand whether it be called profit, surplus or whatever it may be.

The Court: Well, cash on hand, yes. We are talking now about the gross and net profit and if you have a charge and you have figured out everything else and the charge has to be paid, what can you do except reduce your gross or net profit?

Mr. Bohn: Well, not in our view of things and I am not an accountant, certainly, but in a business which is in a high income tax bracket cash, many times, ends up, as a rule, after depreciation is scheduled. In this particular case he has not set it up on a depreciation schedule. In fact he has ignored the increased asset, if we can call it [333] that.

The Court: I may be mistaken, Mr. Bohn. I was under the impression that was built while you had the books.

Mr. Bohn: That is correct.

The Court: They didn't do anything; they didn't set it up on the books.

Mr. Bohn: That is correct.

The Court: So I don't think you should hold the

(Testimony of Norman Thompson.)

defendant responsible for your failure to set it up on the books. That is what you contended.

Mr. Bohn: I didn't contend——

The Court: You are arguing that the books were not properly set up. The responsibility is not theirs but yours. It is equally obvious if they got value—a simple matter that wasn't reflected on the books and they get the benefit for it without paying—but that is a matter you will have to go into. All I know now is the extension was built and the contention is made that nobody agreed to have it built. It has never been used for the purpose for which it was built. Other than that I know nothing.

Mr. Phelan: As a matter of fact, the purpose has been rather obscure, too.

The Court: I have no information on it. I presume we have to rely on the plaintiff.

Mr. Phelan: I have no further questions at this time.

The Court: Now, Mr. Phelan, how many more witnesses will [334] you have?

Mr. Phelan: Possibly recall Mr. Edward Thompson; that is all.

The Court: Are you going to press your counter-claim?

Mr. Phelan: Probably not.

The Court: Well, I am trying to assist you in arranging your time here because tomorrow morning is my Judicial Council morning and I set aside tomorrow afternoon——

Mr. Phelan: I think I can probably be through in 30 to 40 minutes at the most and possibly less.

(Testimony of Norman Thompson.)

The Court: Now are both of you through with this witness?

Mr. Phelan: Until he brings back the other papers—until we get some more books.

The Court: Well, now, suppose we do this—suppose we meet at 9 o'clock tomorrow morning and that will give us an hour and a half in the morning, or roughly an hour and 20 minutes before Judicial Council, and then we will have tomorrow afternoon; if we don't conclude by tomorrow afternoon then we have a problem. I will check my book but it's my recollection that we have something else set up on Thursday. I will see. You understand, Norman, we want you when you come to court tomorrow to have all of the entries that you made even if you just made them on a scrap of paper. We want them here to tie up this June and July hiatus in 1953 and find out what happened during those months, is that clear? [335]

A. Yes, your Honor.

The Court: I think we will recess until tomorrow morning.

(The court recessed at 4:55 p.m., February 15, 1955.) [336]

Wednesday, February 16, 1955, 9:00 A.M.

Mr. Phelan: Mr. Thompson.

The Court: You want to finish up with Norman?

Mr. Phelan: Well, the elder Mr. Thompson brought the records up.

Mr. Bohn: Is Mr. Norman Thompson going to come back?

Mr. Edward Thompson: He didn't understand you wanted him.

Mr. Phelan: Let the record show that Mr. Edward Thompson is taking the stand.

MR. EDWARD THOMPSON

previously called as an adverse witness by the plaintiff and previously called as a witness by the defendant, having been previously sworn, testified as follows:

Reredirect Examination

By Mr. Phelan:

Q. Mr. Thompson, have you got the records of the business for the months of June and July?

A. Yes, last night I asked Norman to get the cash figures for June and July of 1953. I don't think it was made clear but in May of 1953 when we sent Joe Siciliano the termination notice, upon advice of their attorneys in Seattle, the corporation had to rewrite the books as a corporation instead of a partnership if the corporation held that the partnership had never existed, so I asked Norman to send me the books to Seattle and just rewrote them in corporate form, closing them out at the close of

(Testimony of Edward Thompson.)

the corporate year. It took me a month or two months to do that. [338]

The Court: That isn't the only change. You set up a new set of books as of July 31.

A. I am coming to that, your Honor. Those books I set up in Seattle because it is a Seattle corporation. Then I set up a new set of books which I forwarded to Norman. I never thought at the time that I would be required to explain that. If necessary, we could bring the books from Seattle. Norman had a record here of all monies that came in and all monies expended. These were in the office here and you can look at them.

The Court: Now you are interested in June and July?

Q. (By Mr. Phelan): Mr. Thompson, those are the records of cash received and expended during those months?

A. Cash receipts by day for the two months under review and all the money expenditures either by check or by cash.

The Court: Well, I think that is substantially what you want.

Mr. Phelan: Yes, I want the opportunity to examine them and to cross-examine him on them.

The Court: Aren't those to be introduced, Mr. Phelan, possibly as an addendum to the reports so you will have the entire cash story?

Mr. Phelan: I think we ought to put them in the same place, Cris. What is the number of the exhibit that is those reports on the bottom?

(Testimony of Edward Thompson.)

The Clerk: Exhibit I. [339]

The Court: Yes.

Mr. Phelan: May I have them, Mr. Thompson?
Will you please mark them, Cris.

The Clerk: This will be Exhibit I, your Honor.

The Court: Yes, just mark them all Exhibit I
and then just attach them to the exhibit.

Mr. Phelan: I don't know whether they are
punched or not. If not, we can punch them after-
ward. May I glance at them for a second, then I
want to ask Mr. Thompson a couple of questions.

Q. (By Mr. Phelan): Mr. Thompson, would
you give us the total sales for the month of June
and for the month of July?

A. Total sales for June according to the cash
register were \$9,511.64. We actually picked up in
cash \$9,517.05, a little over \$5.00 more than the cash
register shows. The cash register shows \$2,618.54
for July.

Q. Is that for the whole month?

A. I beg your pardon. That is for one week.
The sales for July according to the register were
\$9,993.01. The actual cash was \$10,002.95. We used
the cash for our figure, naturally.

Q. Does that slight overage indicate a mistake
in the register?

A. Yes, sometimes a man might drop an extra
dime or so in without ringing it up or the drawer
may be open.

Q. For the month of June what were the ex-
penses?

(Testimony of Edward Thompson.)

A. These are the cash records. The expenses, of course, [340] we had rent, insurance and things like that and this is simply the cash record and those were regular monthly charges. This is money that was actually paid out.

Q. Do items like depreciation vary from month to month? A. No, sir.

Q. So those items would be the same?

A. They are the same every month. We pay the rent in advance. We pay insurance a year in advance. They are fixed charges every month. We can compute the profit easily.

Q. How long would it take you to do that, Mr. Thompson?

A. Oh, less than a day. I can't reach up in the air and do it.

Q. Is it possible to compute the gross and net profit from those figures and fixed charges?

A. From the fixed charges, surely.

Mr. Phelan: I have no other questions.

Mr. Bohn: May I see those?

A. You bet.

Recross-Examination

By Mr. Bohn:

Q. Now you have here a report of sales for June and a report of sales for July. You have cash expenditures for those two months?

A. That is right, sir.

Q. And that is all these reports show, is that correct? [341]

(Testimony of Edward Thompson.)

A. That is all I thought was asked.

Q. Well, are there any records showing how much profit was made in June?

A. The books in Seattle show it or we can construct it right from the fixed charges.

Q. Can you construct the profit from the figures for the month of June?

A. I think we could, yes.

Mr. Bohn: I do not wish to impose upon the court, but I have been trying to get these profit figures. I would like to have them prepared.

Q. (By Mr. Bohn): Is it something you can do in a few moments?

A. Oh, no, it would take more than a few moments.

The Court: The fixed charges appear in the reports. I think we can come close enough.

Q. (By Mr. Bohn): Can you give us an estimate of what the profit would be in June?

A. I couldn't do it very readily, no.

Q. In other words, these reports do not show the June profit or the July profit, is that correct?

A. No, sir.

Q. Neither you nor Norman Thompson made up a standard report for June and July, is that correct?

A. I don't know whether it was done or [342] not.

Q. Have you ever seen them?

A. I don't know whether I have seen them or not.

(Testimony of Edward Thompson.)

We do not have them in the office if that is what you mean.

Q. Then for a period of two months you did not make up those reports, to the best of your recollection?

A. For those two months I did the bookkeeping in Seattle. I may have made up the reports, but I didn't think it necessary to send them out here to Norman.

Q. You think you made them up?

A. I think so. It would be ordinary procedure for me to do so—post the trial balance and make out the reports.

Q. I think you testified that December, '54, hasn't been made up yet?

A. No, it hasn't been made up yet.

Q. And January, '55? A. No, sir, not yet.

Q. About the same length of time that the reports had not been made up by Henry when your son arrived in Guam, is that right?

A. No, my son arrived in April, '53, and he hadn't made up the January reports yet. He hadn't done January, February, March and April. The books were written up in December and a trial balance was taken and the reports were put in order, but I have been keeping Norman busy on other matters.

Q. In other words, it is a matter or routine that you can [343] put off?

A. No, I knew the trial was coming and he spent a good deal of time digging out records.

(Testimony of Edward Thompson.)

Q. What records did he dig up?

A. He searched for the original books of entry Henry made and things like that.

Q. Where did you keep these records?

A. In the office.

Q. In a filing cabinet? A. On a shelf.

Q. In boxes and things like that?

A. Just on a shelf.

Q. Roughly similar to the way your son testified he found them in Pacific Enterprises when he came out?

A. No, he kept them on a shelf. I don't know how he testified he found them. I wasn't paying attention.

Q. He testified he found them on top of filing cabinets and so forth.

A. We keep the books, the journal and ledger, on the shelf, other things in a filing cabinet.

Q. How long did it take your son to dig up these things?

A. Not too long, about a day, but we spent time discussing them.

Q. Anyway he slipped behind in his reports?

A. Yes. [344]

Q. Because he was busy?

A. No, I took too much of his time, I guess.

Q. Now, Mr. Thompson, when you reconstructed or rearranged these books in the months of June and July, isn't it a fact that what you accomplished was this: That you rewrote the books to reflect the

(Testimony of Edward Thompson.)

situation as if the corporation had been owning and managing this business from the beginning?

A. That is correct, sir, and set them up on the corporation's fiscal year.

Q. In other words, nowhere in these accumulated profit items, such as your surplus in July and your surplus and profit in August, '54, your surplus in July of '53 and whatever your profit was as of August 31, '52—nowhere do these reports now reflect the capitalization of the partnership?

A. No, they are constructed to reflect the business of a corporation.

Q. So we simply cannot find out from these profit and surplus figures what the profit really was if there had been a partnership operating all this time?

A. Oh, surely. The net worth would be the same only if you keep books for a partnership you divide the net worth among the partners but in a corporation you show it as surplus or undivided profits. That is the only difference.

Q. But isn't it also true that the capitalization of the corporation as reflected in these figures is substantially [345] different than the capitalization of the partnership?

A. In this respect—a partnership would not pay taxes; the individuals would pay the taxes.

Q. I am talking now about capitalization.

A. A partnership does not have a capitalization. A partnership has a net worth. The books would

(Testimony of Edward Thompson.)

show the capital of a corporation which would not be shown on partnership books.

Q. And the depreciation schedule is different than it would have been if you had prepared these books as a partnership, isn't that right?

A. No, sir, we use the same figures.

Q. What capitalization did you start with in your present bookkeeping system as of June 22, '52?

A. Whatever amount had been expended at that time. I don't know the exact figure.

Q. The amount that the corporation had expended and not the agreed partnership capital?

A. That is right.

Q. So there is a difference?

A. There is a difference in the capitalization. I have said that, yes.

Q. So therefore we cannot tell from the surplus figures you use and the profit figures you use at the end of the year—we cannot tell what those figures might be if you had maintained these figures as partnership books, isn't that right? [346]

A. Maybe you can't tell but we can tell. Add one half of Joe's capital plus the surplus which hadn't been distributed and that would be the net worth.

Q. I am not talking about net worth; I am talking about profit.

A. The profit is shown by the books and if it were a partnership, the profit would be divided between the various partners.

Q. The amounts would not be identical?

(Testimony of Edward Thompson.)

A. There would be a difference, of course, on account of income taxes.

Q. Also on account of capitalization?

A. I can't see how that would make any difference.

Q. Depending upon the capital investment and fixed assets. What, for example, are you carrying the value of the franchise at now?

A. From the beginning when we opened the books we put it on the books as \$18,750.

Q. On whose books?

A. On the partnership books. Henry had them.

Q. So you started with the value of the franchise at \$18,750? A. Which we depreciated.

Q. And what are you carrying it as in the corporation books? [347] A. Same thing.

Q. In other words, the corporation shows the value of the franchise as \$18,750?

A. That is right, less \$50, less depreciation.

Q. Was the franchise purchased from you?

A. From me and George Henrye.

Q. In other words, the franchises were obtained either by issuing stock to you or cash to you?

A. That is right.

Q. Now you say that the partnership books also had \$18,750 for franchise, is that correct?

A. Yes, we did, yes.

Q. I think you told me that the agreed partnership assets were a total of \$38,000. What made up the difference of \$28,000?

A. Well, \$38,000? Then I must be wrong about

(Testimony of Edward Thompson.)

that \$38,000 carried on there because right offhand I can think of more things than that because we had \$15,000 in buildings alone and \$15,000 in inventory. You are right. It is probable it wasn't carried on the books at all.

Q. Now is that your best judgment that the franchise wasn't carried on the books at all in the partnership?

A. I am surprised it wasn't, but that must be the case, yes.

Q. And when you reconstructed these books as if the corporation had operated it from the beginning you set up the [348] franchise at a certain value? A. That is right.

Q. Now there are other expenditures on the corporate books which were not reflected in the agreed partnership capital, isn't that so? A. Yes.

Q. So when you made your adjustments you reflected those? A. Undoubtedly, yes.

Q. All I am trying to get at—well, withdraw that question.

Mr. Bohn: I have several other questions to ask this witness, your Honor, but they are really not proper cross-examination. I can ask them at this time or when the defendant closes his case I can recall him as an adverse witness. I don't know how the defendant would want to handle it.

The Court: I think you had better ask questions now while the witness is on the stand.

Mr. Phelan: I would like to know what kind of questions they are.

(Testimony of Edward Thompson.)

The Court: Well, then we can determine whether they are questions that should have been asked when he was originally called or matters brought out by subsequent testimony.

Q. (By Mr. Bohn): Were you present when your son, Norman, was testifying yesterday?

A. I was present but I was sitting in back and I didn't [349] hear very well.

Q. I asked him this question: I said "Isn't it a fact that when you first came to Guam you came to Guam to help out not only with the Dairy Queen but with Pacific Enterprises, Talk of the Town and other Siciliano enterprises?" and my recollection of his answer was no. Now I am going to ask you the same question: Isn't it a fact that when your son came to Guam he came to help out partly with the Dairy Queen and partly with the other Siciliano enterprises?

A. Well, his testimony was correct insofar as he knew. He was sent over to take over the Dairy Queen but I had written Joe that Norman would be here and the Dairy Queen probably would not take all of his time and I said he would be very glad to help Henry with Pacific Enterprises. I told Joe that he had considerable experience and that he would be glad to do it.

Q. In other words, he wasn't sent over solely to take over Dairy Queen?

A. So far as he knew he did but I did offer and said he would do anything he could to help.

Q. Now I am going to read to you from a letter

(Testimony of Edward Thompson.)

dated March 8, 1953, directed to Mr. Diza and I am going to ask you if you gave this information: "My son is a good accountant and he will see that the inventory is properly taken. He will price and figure the inventory and he will make the accounting a cinch for you. He will be instructed to work with Henry Diza [350] at all times."

A. The letter is to Diza, yes.

Q. "Henry will get a copy of every statement, inventory and other typing he does for the store. He will discuss with Henry all he is doing or promises to do. He will take over most of the book-keeping for the Dairy Queen so that all Henry will have to do is check to see that it is right. He is a good accountant and I know he will be glad to help in the office whether it is the Talk of the Town or anything else and anything he can do to help will be good experience for him and keep him from getting bored with the island."

A. Yes, I thought the letter was to Joe. Of course conditions changed after that and in May we considered we no longer had to give any information to Henry or anybody else.

Q. That is my next question: Were reports sent to Henry or anybody representing Mr. Siciliano since May, 1953?

A. None since May, 1953.

Q. After that no reports of any kind were sent?

A. Conditions changed.

Q. You didn't send reports—that is my question.

A. My answer was no, yes, sir.

(Testimony of Edward Thompson.)

Q. Now there has been some discussion here, and I think you have heard most of it, about an addition that was built to the building on the original Dairy Queen. Have you heard some of that testimony? [351]

A. Yes, I have heard some of it.

Q. When was the first time that you heard that that building had been constructed?

A. I think on August 2 a letter was written—no, I received a letter on or about August 2, 1952. It said an addition was being put on our building and I wouldn't recognize the building and a few days later W. B. Fuller and Company wired me that Mr. Siciliano had been in to order some glass for a building and asked that the invoice and shipping documents be sent to Mr. Siciliano on Guam rather than to me and they asked if that was satisfactory with me, and I wrote them that I hadn't heard from Mr. Siciliano since early in July and asked them to hold it up until I could see or contact Mr. Siciliano. That is the first time I heard about it.

Q. You knew in August, 1952, that this building was constructed? A. That is right.

Q. Did you ever receive a letter from Mr. Turner or anyone else in which you were asked to make provision for reimbursement of those expenditures?

A. No, sir, not then but I did, yes, recently.

Q. I am talking about back in 1952?

A. No, sir.

Q. Isn't it a fact that October 10, 1952, you re-

(Testimony of Edward Thompson.)

ceived a letter from Mr. Lyle Turner in which he made the following [352] statement: "I have asked Henry for the figures on the cost of the addition to the Dairy Queen building since he advised me yesterday this has been dispersed from Pacific Enterprises' funds. It is my desire to have that disbursement reimbursed at the first opportunity in view of the pending litigation on Guam. I am writing you further on this as soon as I have the figures on hand." Did you receive such a letter from Mr. Turner? A. I don't remember.

Q. Would you say you did not receive it?

A. I won't say I didn't receive it; I don't remember.

Q. Isn't it a fact that in the fall of '52 some time you knew that a request was being made of Dairy Queen to reimburse Pacific Enterprises?

A. I do not remember now. We would have refused to pay anyhow. We didn't want the addition. We have never used it. It was not put up as an addition to the ice cream plant; it was put up as a snack bar. There is no question about it. Mr. Joe Siciliano called up long distance from Las Vegas and Joe said "You must be mistaken; you were just excited," and I denied it. He said it was all finished and in operation. He called it a snack bar and I don't know what the rest of the conversation was but a day or so later I wrote him and told him, confirming my statement over the phone, that I had never heard of it and never discussed it with him. It was a complete surprise to me. And then I said,

(Testimony of Edward Thompson.)

“However, if the snack bar is completed [353] and in operation, it is water over the dam.” Then I said I presume the snack bar being on partnership property it would be for the benefit of the partnership, or words to that effect.

Q. You don't deny it was for the benefit of the partnership?

A. I don't know. It has never been used for it.

Q. Regardless, it is a fact that it was constructed and almost completed but you refused to OK the vouchers on the windows and it couldn't be put in operation?

A. No, sir, that is not true. Joe Siciliano went to W. B. Fuller and Company and, as the telegram said, told them to send the invoice to him and not to me and Fuller Company wired to ask me what I knew about it.

Q. In any event as a result of that situation the windows weren't sent at that time?

A. Yes, I told them to hold them up. We didn't want the snack bar. We didn't have any use for a snack bar.

Q. I am not trying that litigation now. Judge Shriver wanted to bring up that particular point. Now there has been some discussion throughout this trial of matters involving a claim for payment of housing and subsistence for the employees of the Dairy Queen of Guam. I am going to ask you when you first knew that such a claim was going to be made?

(Testimony of Edward Thompson.)

A. I got the claim, the statement, on or about April 11, 1954. [354]

Q. When did you first know that subsistence and housing was being furnished to these employees by Pacific Enterprises and that they were expecting reimbursement for it?

A. I don't know that. That was brought up, I knew that they were furnished subsistence and housing, but all disbursements were being made from cash and the monthly reports showed payroll and such and I didn't know whether that included subsistence and housing or not, but so far as I know no statement was ever given to me or mailed to me until April, 1954.

Q. Isn't it a fact that January 2, 1953, Mr. Lyle Turner wrote you a letter in regard to these employees and used the following language: "The cost of said laborers to Dairy Queen of Guam, \$120 a month. In the case of Dairy Queen lead men your company will be generally debited for the room and board of these employees."

A. Yes, but those were being paid by cash and I don't know whether that was being paid or not.

Mr. Bohn: I have no further questions.

Mr. Phelan: I have a couple of questions.

(Testimony of Edward Thompson.)

Reredirect Examination

By Mr. Phelan:

Q. Mr. Thompson, one of Mr. Bohn's first questions was pertaining to profit. Has profit got anything to do with the amount of capital invested or is profit a certain sum——

A. Oh, if the profit is left in the business it is part [355] of the capital of the business, yes.

Q. What I mean is does the amount of profit have any relation to the amount of profit you make each month?

A. No, except it helps you earn.

Q. So if the books were kept on a sole proprietorship or a corporation if you made a profit of \$1,000, it would still be \$1,000? A. Yes.

Q. The percentage on the amount of capital investment would vary? A. Yes.

Q. But the amount of profit would be the same?

A. If you made \$1,000, you made \$1,000.

Q. Now, Mr. Thompson, is it possible that this franchise was contributed?

A. I beg your pardon?

Q. Is it possible that the franchise was contributed to the partnership at its inception without being considered as more than \$1.00?

A. I didn't think so but evidently it was. Evidently we omitted that.

Q. Now, Mr. Thompson, in 1952, during the year 1952 who was the attorney for American Pacific

(Testimony of Edward Thompson.)

Dairy Products on Guam? A. Lyle Turner.

Mr. Phelan: I have no further questions. [356]

Mr. Bohn: I have no further questions, your honor.

Examination by the Court

Q. I just want to know for my general information—why was this addition that was constructed, if not otherwise being used, not used for warehousing purposes?

A. It wasn't big enough for warehousing purposes.

Q. Your testimony was you had about 16 by 30 feet?

A. 16 by 30 feet, yes. It was cut up into two rooms. We require more than that for warehousing.

Q. It was cut up by a partition, wasn't it?

A. Yes.

Q. By removing the partition couldn't you have used it for warehousing?

A. I don't know. We require more than that. You see, we bring in over 40 drums of mix at a time and the drums are that big around (indicating). They weigh 300 pounds. You can't stack them one on top of the other. You can't get the boys to pick them up. If you had a hoister you could move them around, stack them two high. Then we had cases of flavorings at that time and then, of course, we use bags and spoons and other things. We have quite a large warehouse.

(Testimony of Edward Thompson.)

Q. If it had been adaptable it would have been very beneficial as it would cut down your cost.

A. It would have been very handy, too.

Q. You are paying so much a month for warehousing? [357]

A. \$65.00, yes, sir.

The Court: That is all.

Mr. Phelan: I have nothing further to offer.

Mr. Bohn: I beg your pardon, Mr. Phelan. I didn't hear you.

Mr. Phelan: I have nothing further.

The Court: You can start in on your rebuttal.

Mr. Bohn: We have no further witnesses, your honor.

The Court: We agreed that at this stage the defendant's cross-complaint in the case of Siciliano vs. American Pacific Dairy Products should be dismissed for failure of any proof.

Mr. Phelan: The record is confused enough now without trying to go into the elaborate accounting calculations that would be necessary to prove that cross-complaint.

The Court: Yes, so far as any cross-complaint by Pacific Enterprises or American Pacific Dairy Products vs. Siciliano that is dismissed.

Mr. Phelan: In this one case.

The Court: In this particular case. That has nothing to do with your cross-complaint against Pacific Enterprises, Inc. Now, gentlemen, I want to discuss at this time my initial thinking as regards this case. It is not the judgment of the court because I simply want you to be in a position to

discuss the problems which I raise. First, that the evidence appears to be clear that at the time this agreement was entered into [358] between the plaintiff and the defendant it was contemplated by both parties that the plaintiff would continue to be available in Guam and to provide managerial assistance in the proper operation of the store. I think that is evidenced not only by the testimony but by the partnership agreement itself, which provides that the defendant shall devote such time as may be mutually agreed upon between copartners, together with his skill and energy, to the best interests of the business and obviously he could not devote any time or energy from Las Vegas, Nevada. "The second partner agrees to devote such time as may be mutually agreed upon between copartners, together with his skill and energy, to the best interests of the business of the copartnership." Now the first party similarly undertook to devote such time and effort and so far as I can determine the first party, insofar as the operation of this business is concerned, has kept its agreement and has provided that assistance from Seattle, the purchasing and so forth which undoubtedly took up considerable time and rendered every possible assistance. It seems to me to be equally clear that Mr. Thompson was thoroughly sold on Mr. Siciliano's ability to do a job in connection with the Dairy Queen and was anxious to continue that association as evidenced by the agreements, the suggestion of extension to Okinawa. In other words, he was impressed with the fact that Mr. Siciliano knew this section of the country and

was extremely capable of exploiting the economic opportunities which might exist here. [359] I think your evidence shows again that Mr. Thompson nursed this thing along by his correspondence and by the friendly atmosphere which prevailed; a willingness to help him out in any way he could in his domestic troubles; efforts to get him to return to Guam, if possible, and all that kind of thing. We find nothing here except the friendliest attitude, but undoubtedly Mr. Siciliano was of major assistance in connection with the opening of the store. I do not assume that the store would not have been opened and operated with reasonable success if Mr. Siciliano had not been available for the simple reason that it was a new product. Mr. Siciliano had nothing to do with the building, the leasing of the land, the equipment, the obtaining of materials and all that sort of thing. Primarily the opening was simply a question of the finishing touches and exploiting a business which, because of its unique character in Guam, was bound to attract a considerable amount of patronage, so I think we can safely assume that. Again let me remind you that I am just throwing these things out for discussion. It appears to be true that Mr. Siciliano's associates, Pacific Enterprises, did a better job of management than Norman Thompson did after he took over as the ratio of profit, net profit, appears to have been greater, but that may be elusive because we have not yet determined what hidden obligations there may have been on the part of the alleged partnership to creditors which were not reflected in the

reports. Neither do those statements show [360] any charges made by Mr. Siciliano for such management or any pro rata charge for bookkeeping, supervision and so forth, so it is that we have rather an elusory assumption at the present time. The position taken by the defendant in this case is that there was a failure of consideration and that consequently the defendant was at liberty to cancel its written obligation at will. I do not accept that for a moment. I think it is perfectly clear from this testimony that while we talk about a board of directors, that Mr. Thompson is the corporation to all intents and purposes; that when it comes to the management, that the corporate directors were thoroughly familiar with this contract as early as August, 1952; that they accepted it; they approved it and they accepted Mr. Thompson's assurances that it was a very sound transaction on behalf of the corporation. So far as ratification, the contract was in existence. I don't care to hear any more on that. I think that is a closed issue. Mr. Thompson and Mr. Turner said it was a closed issue; there never had been any doubt about it. It had been approved but they thought it wise to put in certain contingencies as to his return, so we have Mr. Siciliano, through his associates, operating this business until April. Now I quite agree with the defendant that the way this business was operated was not in accordance with the contract and I quite agree with the defendant that something had to be done to regularize the operations; that in the ab-

sence of Mr. Siciliano's interest, presence, energy and so forth, the [361] copartner did not have to rely upon employees who were not even responsible to the partnership to see that its activities were continuing. There were inadequate cash controls, ridiculously inadequate, because with this type of operation, very clearly the bank account should have been the control. The money should have been paid into the bank account, drawn out of the bank account and set up on the books so that there was adequate control at all times. That was not maintained and I agree, certainly, with the defendant that it was entitled to take steps to recapture the management of this enterprise for the partnership. At that time it was not being managed by the partnership at all. It was out on the right or left somewhere. Theoretically nobody had any control. Mr. Thompson had no control over anybody except those who were actually employed and whom you were paying at the plant itself. Now that was highly irregular. Now we know that this condition continued by virtue of the fact that Mr. Siciliano's plans were uncertain and presumably he expected to return to Guam at any time and to take over his business enterprises again. We should not delude ourselves simply because it isn't in the record. There were domestic difficulties, there were suits in court and so forth and he was in a very messy situation as regards the situation in Guam. This partnership agreement provides a method for its dissolution by one partner buying out the other. Both parties abandoned that as a method of settling

any differences between them as regards the agreement. [362] Neither party has offered to purchase the interest of the other in accordance with the formula that was established. The defendant arbitrarily took over and said "You are out." The defendant had the alternative at that time of bringing an action for rescission, paying what it considered a just contribution into court. It did not do that. It continued to use the capital contribution: it continued to use the profits as it saw fit. It is my view that this partnership agreement, so-called, is not authorized in law. So far as I can determine the articles of incorporation of the defendant do not authorize it to enter into partnership agreements, but very clearly the corporation was formed solely for the purpose of operating this store in Guam and other stores. It has received the benefits of capital, effort and everything that was required to make a going concern of the business from the plaintiff and cannot be heard now to say that it had no legal authority to do so. If it is not a partnership, it is a joint enterprise. I think that it is a joint enterprise entered into between the parties. I think that that joint enterprise ceased as of the time that the corporation took over effective control of the partnership and excluded Mr. Siciliano. I think that it took over that effective control as of July 1, 1953. I think that Mr. Siciliano is entitled to a judgment which will give to him his capital, his share of the profits to July 1, 1953, and to interest at six per cent on that from July 1, 1953, until paid. I think that in order to enforce

that judgment he [363] is entitled to a receiver immediately. I think that he has a lien or half interest in the Dairy Queen and I think the corporation holds in trust for him to pay the judgment 50 per cent of the stock which it owns in the new Guam corporation. Now we are dealing with a practical situation here. This is a small enterprise. It is not large to the extent that when you add to your cost of doing business everybody loses; to the extent that you complicate the operation of that business you will benefit no one but the competitors of that business, and therefore I think that Mr. Norman Thompson should be appointed receiver for this operation and that counsel should agree upon an independent accountant to make a study of the information we have and advise the court as to what amount is due Mr. Siciliano at the present time. Now this is not my judgment nor my findings of fact. I merely throw these out because I want you to shoot at them and I want you to question them. I will first hear from the plaintiff.

Mr. Bohn: Well, your honor, first of all, I shall say that I appreciate the very clear exposition that the court has made of the issues in this case and its general suggestions as to the matters which may or may not have been proven. I cannot find myself in disagreement on too many points. There is one, however, where I must be in complete disagreement and that is that the joint venture terminated as of any date prior to the date this court declares a dissolution. It is my theory that joint ventures in judging—— [364]

The Court: Now, Mr. Bohn, the court takes into consideration in connection with that that the corporation had effective control of all of the assets, the money and everything else as of July 1, 1953; that you began no action, nor according to the evidence here, demands were not made or anything else until September of 1954.

Mr. Bohn: As to those facts I cannot disagree, as to the fact of effective control in July of 1953; I cannot disagree as to the fact that no action was brought or demands made pertinent to this matter until the date this action was commenced. I cannot disagree. It is a question of law which I am propounding, which I believe to be sound. There has been some confusion in the cases, that I concede, as to when dissolution of one of these agreements actually takes place. I believe the better view is that there can be no dissolution until ordered by a court of competent jurisdiction. Certainly actions can occur throughout the operation of a business which the court might well find would have warranted a dissolution at the time had an action been brought, and I also concede that there is confusion in terminology in the cases when they talk about dissolution by an act of the parties, but in general it is my view, and I think the latter cases bear me out, that there is only one way in which a partnership, and I believe that the same rules apply, can be dissolved and that is by order of a court. Certainly there is no doubt whatever that the court can order that today or order [365] it any day.

The Court: Mr. Bohn, I have no way at all of measuring the damage which may have occurred by virtue of the fact that Mr. Siciliano ceased to have any management of the operation of the business as of July 1, 1952. I don't think he can demand that he is entitled to 50 per cent interest at the same time clearly demonstrating that he has done nothing personally to fulfill his obligation.

Mr. Bohn: That leads me to the only other point with which I disagree with the court. It is my view that what was in these parties' minds prior to the execution of this contract becomes immaterial by virtue of the contract itself. I think it is true in any agreement that is ever reached that people have conflicting ideas.

The Court: Mr. Bohn, you presented evidence of the preliminary negotiations; you went back to the time that Mr. Siciliano was originally appointed an agent.

M. Bohn: That was done for the purpose of indicating that there was a change in tempo from what Mr. Thompson stated to this court he had in mind at the time of the execution of this contract.

The Court: Surely the court has a right to determine the matter on the theory which the parties advanced, and your theory was that you had rendered considerable service in advance of the agreement and so forth, so if you went behind the agreement—— [366]

Mr. Bohn: That evidence was also introduced for another purpose—it was to show this: I don't think there is the slightest question but what a year

and a half before this agreement was executed, Mr. Thompson was looking for a manager on Guam. He wanted Mr. Siciliano and couldn't get him. He wanted Mr. Siciliano in a 20 per cent corporate business and he couldn't get him.

The Court: Which he freely admits.

Mr. Bohn: So then he finally came and said, "I will sell you 50 per cent."

The Court: Exactly, "I want you that much."

Mr. Bohn: But "I also want your \$15,000."

The Court: We have no evidence here to that effect.

Mr. Bohn: We have a payment of \$15,000, your honor.

The Court: I would think just the contrary because, as you say, they originally tried to keep his contribution lower, to 20 per cent, and he said "I am not interested unless I have 50 per cent," and it was he who insisted on the 50 per cent, not the corporation.

Mr. Bohn: Then my point is, your honor, that he bought and paid for it.

The Court: That is correct.

Mr. Bohn: And having bought and paid for this interest and from all that appears from the agreement of the parties, and I am sure it was true, as of this moment they are on an equal basis. [367]

The Court: If that is what he wanted he had a perfect right to put in his contribution and be paid a profit, but he didn't do that. He agreed to devote his time and energy.

Mr. Bohn: On that point I find myself in slight disagreement with the court.

The Court: What does the partnership agreement mean?

Mr. Bohn: I take it there are two agreements.

The Court: We are not talking about the management of the business. If nothing more, we are talking about "The second partner agrees to devote such time as may be mutually agreed upon between copartners, together with his skill and energy, to the best interests of the business of the copartnership."

Mr. Bohn: Now I take the position that that has to be read in its entirety and that the last sentence does not modify the first. In other words, I would read that to mean that the first partner or second partner——

The Court: Mr. Bohn, you don't question that it was mutually agreed that Mr. Siciliano would be the manager?

Mr. Bohn: Now let's see whether I question that or not. I take that that it is mutually agreed at this time. In other words we have no evidence before this court that there was any supplementary agreement to this, that he would personally manage the business, as a matter of fact, while we do have evidence before the court that as of this time Mr. Siciliano was operating four or five very large businesses; that while the \$300 a day [368] this business took in was substantial, it was a drop in the bucket compared to the \$2,000 or thereabouts

a day which was coming in from his other businesses.

The Court: Exactly.

Mr. Bohn: Now to treat Mr. Siciliano, the owner of a large corporation and large enterprises, in the same category as an individual who was given a 50 per cent interest for an investment and who personally agrees to manage a business is, I believe, not to give full consideration to the situation which was required. In other words, the name Siciliano has been used and Mr. Thompson very graciously testified as to his high opinion of Mr. Siciliano, but it seems abundantly clear to me from the evidence that what was needed for this business and what it got was service, equipment, know-how, transportation operations.

The Court: And failure to repair a cash register for months.

Mr. Bohn: Well, I have no detailed information on the cash register, but to me it is abundantly clear that in June of 1952 how did you transport things from the dock to the Dairy Queen?

The Court: Exactly.

Mr. Bohn: Where did you find air-conditioned warehouses in June of '52 on the island? Where does one find employees in June of '52, competent to run this business? In other words, I am not in substantial disagreement with this court. [369]

The Court: He found them through Mr. Siciliano. Your initial assumption is that after having paid his initial contribution he could wash his

hands entirely; the second that he was acting purely gratuitously?

Mr. Bohn: The second agreement spells out the exact interest of the parties in physical assets and in the operation of the business. In other words, I think you have two separate matters here: (1) As manager he gets \$600 a month. If other stores are opened he gets more a month. He bought and paid in cash at that time when this organization needed the money, was in debt, had no cash. He bought and paid for an interest in the business and I do not believe it is sound to say——

The Court: I don't follow that too closely. They owed \$8,000 and according to the testimony they invested \$42,000.

Mr. Bohn: Mr. Thompson testified that they owed \$8,000 and they had \$1,000 in the bank and that is all. That presupposes that the business got open; it presupposes that the creditors did not sue and attach the building; it presupposes that they were able to open the business and spend such other funds——

The Court: It presupposes that they were solvent; their assets were greater than their liabilities.

Mr. Bohn: Well, then we have the testimony what good does a franchise do to pay a bill?

The Court: Of course, you have the vitality to open a business. [370]

Mr. Bohn: And the cash.

The Court: That doesn't mean surely when you are opening up a business which has great attractions and you have your physical plant and all your

supplies and so forth that simply because you still owe money you can't open. Presumably a mortgage could be placed on the building, fixtures or anything else. I think I have covered that in my preliminary analysis. I certainly cannot concede that this store would not have opened except for Mr. Siciliano.

Mr. Bohn: Well, let's put it another way, your honor. In fact Mr. Siciliano bought and paid for a piece of property. I believe it is not sound that what we bought and paid for should be forfeited at any date prior to a date fixed by this court as the date of dissolution. I consider that any deprivation of this property prior to that date is a complete forfeiture and violation of the agreement of the parties..

The Court: In other words, it is your flat contention that Mr. Siciliano owed no obligation?

Mr. Bohn: It is my flat contention that Mr. Siciliano bought and paid for a half interest. He was obligated to manage the business in such time as might be mutually agreed upon between the parties and that for a period of a year and a half and more they corresponded to see if they could reach an agreement in view of Siciliano's absence. Apparently no exact agreement was reached and in the meantime Mr. Siciliano's organization [371] carried on the business.

Mr. Phelan: Have you got time, Judge, to continue?

The Court: I have ten minutes at this time then we will meet again at 1:30.

Mr. Phelan: I made notes on your comments and I am going to read the notes on some of them. I agree with the court's comments 100 per cent that it was the intention of the parties that Mr. Siciliano would manage the business. I believe it is also apparent from the testimony that back in 1952 Mr. Thompson was going to act as the continental purchasing agent and I believe the testimony is uncontradicted that he did that. Now I think there is no question from Mr. Thompson's testimony that he and through him the directors of the corporation were sold upon Mr. Siciliano's ability, and I think the court will take judicial notice of the fact that Mr. Siciliano demonstrated up until 1952 remarkable business ability. Then for some strange quirk or circumstance Mr. Siciliano suddenly dropped everything, got on an airplane and left the island for two years. Mr. Siciliano's bookkeeper, the bookkeeper of Pacific Enterprises, who was Mr. Siciliano's alter ego, has testified that he did not send Mr. Siciliano any reports whatsoever concerning the Dairy Queen during that two-year absence.

The Court: Nor did he hear anything from Mr. Siciliano asking for reports. He had no word from him at all.

Mr. Phelan: That is rather a strange way for a business [372] man to handle a business involving large sums of money. I think there is no question but that Mr. Thompson and the directors of American Pacific Dairy Products, Inc., leaned over backward to avoid injuring Mr. Siciliano in any way and to do everything possible to convince him that

he should come back to Guam and go into business. They were convinced his absence was not only hurting the business they were interested in, it wasn't doing his other business any good. I think the court will take judicial knowledge of that.

The Court: Of course, the court cannot take judicial notice of that.

Mr. Phelan: I think the court can, due to the numerous lawsuits in this court.

The Court: The court can take judicial notice there has been a lot of litigation.

Mr. Phelan: Now there is the question as to whether or not under Norman Thompson's management he did or didn't do as good as the management of Mr. Diza, etc. However, there has been evidence showing that certain expenses and obligations were not reflected in Mr. Diza's books, but there were certain expenses Mr. Thompson does show on his books that were not shown there, one is his own salary. Then there has been some testimony that the volume of business on this island has been on a decreasing scale for the last 18 months or two years. There has been a certain amount of that and it has been testified to. [373]

The Court: Obviously your profit goes down as the ratio of expense to total sales goes up. We were talking here about approximately the same volume of business in which event your observation would not be valid.

Mr. Phelan: But your fixed charges have increased on the books because certain charges like

Mr. Thompson's son's salary were not reflected in a comparable item on the books maintained by Mr. Henry Diza.

The Court: You have 6 or \$700 a month which was not charged before.

Mr. Phelan: From testimony here Mr. Thompson, Mr. Edward Thompson, has agreed that invoices he sent from the States were reflected in Mr. Diza's books and he has agreed that he always eventually got the money for those to pay those invoices or the corporation got it and they were paid. However, he had to take those figures due to the cash operation of the business here. For many months he had no way of going beyond that to see what—and apparently the books did not reflect—during that period what should have been reflected in those books. There was no way of checking it because Mr. Diza did not reflect any charges for this addition down there and certain other items like that insofar as he only knew what was in the books, that is all. He could only prove what came to Seattle. He knew that definitely and he could go to the corporation. Now one of our defenses is failure of consideration. The method Mr. Diza adopted to keep [374] the books I don't think was good. We have had Mr. Norman Thompson's testimony as to the conditions he found in that store. Now that is a milk product. We are in the tropics. Good management, I would say, means high standards of sanitation and if in your mixing tank of your basic product you can find mold in there—milk is very dangerous—I think it shows that dur-

ing that period before Mr. Thompson got there, there wasn't any supervision down at the store. It is admitted that Mr. Siciliano didn't supervise. Actually who did? Mr. Diza paid the bills and the boys came down and ran the business. I don't think there is any question that there were thousands of dollars invested in this and that the corporation which is 6,000 miles away had to do something about it. They had started out with a partnership agreement. That is dangerous, very dangerous. The other partner can bind you. There was the practical question of what they were going to do. If they could get him back, good. If they couldn't, what were they going to do? It seems they took direction by their counsel in the States. I don't know; I have no way of knowing. I have no right to as how and why other attorneys at various stages in a long series of business transactions came to certain conclusions. I don't know the gentlemen that preceded my interest in this action. I agree with the court the dissolution paragraphs in that agreement have been completely disregarded by everybody. However, it was the opinion and advice of Stateside counsel of this corporation that there [375] had been abandonment. The contract had never been ratified. There was conditional ratification; the conditions were not complied with. Therefore they say, "We have some money you paid. We haven't got a contract. We have a moral obligation to return this money less any damages or sums of money you owe us," and that is, I think, basically why this corporation pursued the steps

they did. I don't pretend to know the law of the State of Washington, which isn't available on this island.

The Court: The State of Washington doesn't govern this.

Mr. Phelan: We must recognize that it was a Washington corporation and the acts of the corporation must, to a certain extent, be governed by the laws of that State.

The Court: Well, as far as certain powers are concerned, but if they come into Guam and do business they do business based on the laws of Guam.

Mr. Phelan: A foreign jurisdiction cannot extend powers; they can reduce the powers of a corporation but they can't spread them out; they are held down by their charter and their laws.

The Court: Correspondingly neither can they give power which the locality prohibits.

Mr. Phelan: They can't be expanded but they may be reduced in a foreign jurisdiction.

The Court: In the State of Nevada you have legalized gambling, but that doesn't entitle you to do it in Guam.

Mr. Phelan: My research indicates that the partnership [376] agreement was not specifically authorized by the statutes and I have serious doubts as to whether it would stand up. I don't think they are authorized to go into a partnership. I don't think an officer of a corporation is authorized to enter into a partnership by himself.

The Court: Yes, but the records show that it was entered into and that they approved it.

Mr. Phelan: We must not forget this fact: Mr. Siciliano was formerly dealing with this corporation, had been their agent on Guam, and that—

The Court: Now there were actually two series of negotiations. Now the court is going to recess until 1:30 this afternoon to continue this and I suspect it will take about an hour and at the expiration of arguments the plaintiff, Pacific Enterprises, should be prepared to proceed with its action.

Mr. Bohn: The other case to start this afternoon, your honor?

The Court: The second case, yes.

(The court recessed at 10:30 a.m. February 16, 1955, and reconvened at 1:30 p.m., February 16, 1955.)

The Court: Proceed, Mr. Phelan.

Mr. Phelan: I am taking up where I left off from notes I made this morning. I am not at all sure that I can agree as to the existence of a joint enterprise, though based upon your Honor's conception, it will be something akin. In other [377] words, two people were interested in a common thing. We do admit that there are some funds in there that are not our funds. I can't quite agree that the 1st day of July was the date that the American Pacific Dairy Products took effective control. I think it is approximately the 1st day of June, 1953, because by that time Norman Thompson was in control of the business.

The Court: Well, I am assuming that the corporation set up a new set of books as of that date, ceased to do business under the previous understanding, and that their new set of books was made effective as of the 1st of July, and during the month of June, of course, there were no reports made.

Mr. Phelan: Of course, the reports are just a compilation of the results of the daily transactions of the business.

The Court: Of course there were still services being performed, the warehousing and the continuance of employees.

Mr. Phelan: I don't know the date the warehousing ceased. Honestly, I don't know the exact date. Now with respect to profits, since there are items which do not appear in the books, no one here is in a position to say what the correct profit was for any one month, including the first month of operation. That will have to be determined by an accountant.

The Court: Yes, you will recall that I suggested that the court would have to have an accounting by a qualified accountant.

Mr. Phelan: The only qualified statement we have [378] is that no funds went to the States except money owed to the corporation or for the purpose of supplies. We have no exact statement of any other figures.

The Court: Well, we have a reasonably acceptable cumulative statement as of May 31.

Mr. Phelan: Yes, but the other testimony intro-

duced was, as I pointed out, we did not know what obligations may have existed as of that date.

The Court: I assume the only possible obligations are those involved in the next case, the case which was consolidated with this.

Mr. Phelan: We don't know of any, but I do admit that there has to be an adjustment because the books do not show it.

The Court: Obviously in a joint venture anything the joint venture owed at that time which was payable naturally cuts down on the profits.

Mr. Phelan: I think, basically, what transpired after the cut-off date is of no interest.

The Court: If my view is valid.

Mr. Phelan: Up to the cut-off date, yes, there has to be an accounting.

The Court: Yes.

Mr. Phelan: After the cut-off date if Mr. Siciliano is due \$5.00 that he hasn't got, I think we have needlessly consumed time, asking about funds I don't think are in point. [379]

The Court: Do I understand the defense accepts the court's theory?

Mr. Phelan: To a certain extent. I can't say otherwise. We have never contended we don't owe him money. I question his rights to profits during the time he or his employees were in the business. What has he got coming? How much of those funds has he got coming to him? The only way you can determine that is by an accounting that I know.

The Court: Of course, I think we have to recognize we are dealing with a solvent operation as of

the 1st of July, 1953, and within the framework of that solvent operation through the use of his capital investment along with the corporation's plus the managerial service that was performed, profits were earned, and surely the corporation cannot be heard to say that they are entitled to all of those profits. In other words, we have no evidence of damage here. That may be a valid assumption, but it isn't anything we can tabulate as a legal definition, so with those factors involved, the capital plus the investment, minus one-half of any current obligations, obligations which were validly payable and which were not paid, which were incurred during that period and not paid, then I think you have the formula that I suggested. I merely throw that out as something that I would consider as representing an equitable adjustment.

Mr. Phelan: Well, I think, then—am I correct in assuming that the court feels the accounting problem is up to [380] the middle of 1953? That is the period that has to be accounted for?

The Court: Up to July 1, '53, and only up to that date.

Mr. Phelan: I think we wasted a lot of time discussing the financial transactions after that.

The Court: Well, not necessarily. We had to have the complete pattern before us because the corporation did take effective control and I have no evidence before me that Mr. Siciliano objected to that control or that he took any steps prior to September of '54, so I must assume a certain amount of acquiescence in the assumption of that exclusive

corporate control, and if that is correct then the joint venture ceased as of that time.

Mr. Phelan: I have two points I should like to call to the court's attention: First of all, there were certain leases which should be taken into consideration because they stand in the partnership's name.

The Court: Certain what?

Mr. Phelan: Leases on the lot down there.

The Court: Well, the lease on the lot, of course, is all part of the initial capitalization.

Mr. Phelan: True, but I mean the lease of record, the assignment of lease as recorded. Those things should not be forgotten, and I have one other thought based upon this whole thing and that is Mr. Siciliano left seven or eight days after [381] this agreement was signed and——

The Court: I think that is admitted.

Mr. Phelan: I have two matters that I would like to discuss with the court. I will not unduly prolong this proceeding by repeating any of the matters that were discussed before, but I am asking at this time, with the court's permission, for clarification on one or two items in accordance with the views heretofore expressed: In the accounting which the court suggested did the court have in mind that the accounting would be based on the assumption that the partnership was a valid joint venture during this period of time, an accounting on the original capitalization just as if this had continued as a partnership or joint venture?

The Court: That is correct and the court further assumes that you had a valid joint venture or part-

nership for our purposes and I don't think it makes too much difference that the corporation cannot be heard to say that that agreement was not valid during that period of time, having received benefits and having joined in the accomplishments which were done, but that as of July 1st you had a cessation of that relationship by corporate action not protested. In other words, one partner or one joint venturer found it necessary to take over the entire operation and to consider that the other party had failed in his obligation to the partnership, and I think, as I have said, I just don't see how—a two-people partnership or even joint venture involves a confidential relationship, one party to the [382] other. It isn't the normal transaction. You have got to have mutual confidence and trust and here you have a business operated by people who have no obligation to the corporation partner at all, not even employed by the corporate partner, but simply acting under what we would consider rather hazy instructions by Mr. Siciliano before he left.

Mr. Phelan: The second question which I had in mind—to let me further clarify, if I may, the reason for my first question—it is apparent from the testimony that certain adjustments were made in the books to fit into the corporate picture and I was requesting clarification——

The Court: I think those adjustments took place after the period to which I am referring.

Mr. Bohn: Well, they apparently predated them.

The Court: In other words, I think counsel should come to accord and acceptance of a formula.

It would not be too difficult to arrive at. You have only two months, only one month, actually, the month of June. It is the only month that we would have to consider in addition to your statement of May 31.

Mr. Phelan: Would not the basic figures from which all other figures were derived be the same adjustment or not?

Mr. Bohn: I was thinking in terms of—

The Court: In other words, you made a profit in June. Now, I think we have to consider that Norman Thompson's salary [383] had to be deducted from that June profit. The May profit ostensibly reflects it and since your sales were pretty much the same, I don't see how you can be far off, for example, in accepting the May figures as representative of the June figures.

Mr. Phelan: Well, they have figures for expenses for the month of June.

The Court: Well, the testimony was there was nothing unusual in June. The expenditures were pretty much set.

Mr. Phelan: The variation would normally only be in the amount of supplies you consume.

The Court: And the supplies in turn are reflected in your gross. If you paid out money for supplies in June either they were used or added to your inventory, which would show on your report.

Mr. Bohn: There is an additional question I would like to ask the court, with your permission. It bears not only on this case but the case to follow

and that is the court's views as to whether or not Mr. Siciliano or his organization would be entitled to payments, any payment, of that \$600 per month salary for the period that they were in active management and prior to the date that Norman Thompson took over?

The Court: Yes, I can readily see the point that you are raising, but it seems to me that that depends upon what your corporation is able to prove in its claim.

Mr. Bohn: Now, for example, if I might proceed one step [384] further: We have in our corporation claim a statement for time for Mr. Meggo, a statement for some time for Mr. Viet. Now, should the court be disposed to agree that the total over-all managerial service was substantially performed during this period of time that the Siciliano organization was in control, then it would obviously be a duplication for us to ask for payments for Mr. Meggo and/or Mr. Viet. I do not mean to include in that the matter of trucking and that sort of thing, which they apparently started to pay for themselves later on.

The Court: Now, Mr. Bohn, the salary which was set up in the partnership agreement was to be paid to Mr. Siciliano. Now there is evidence here of Mr. Thompson's report to the directors that Mr. Siciliano advised him that there would be no salary charge during the period that he was absent.

Mr. Bohn: And we have made no claim for salary. However, if the court please, if I understand the court's present view, the services which

were contemplated were substantially performed during the period, at least running up until April of '53.

The Court: I think that is correct, Mr. Bohn, but in trying to equalize the contributions we have services being performed at the Seattle office for which no charge is made against the partnership. Now it isn't the fault of the corporation that Mr. Siciliano was unable to perform his duties. If no action was taken by them prior to April, in reliance upon his [385] assurance that the operation would continue and that he would not charge any salary, then I must assume that he expected to be compensated out of his share of the profits.

Mr. Bohn: And I do not—it has not been the theory——

The Court: You must remember also you have no evidence before me so far as personal services are concerned——

Mr. Bohn: Well, I concede to the court.

The Court: That any of these people who testified received any more for their additional work than they were receiving in turn from Pacific Enterprises.

Mr. Bohn: Well, if your honor please, I am not sure I can concur in that view.

The Court: Well, you will recall, Mr. Phelan asked the question as to whether you did this on your own and the manager, Mr. Meggo, testified that he was down there at all hours on his own. There was no testimony that he received any additional compensation as I understood their testimony.

Everybody did this work in addition to his normal work. They just added an additional burden to everyone who was involved.

Mr. Bohn: If your honor please, I did not intend—I am not sure I understand the situation. Here is a man—two people who bought an equal interest in a business. One of them kept it going for eleven months through his organization. He was not compensated. The other did some purchasing in the States. He has not asked for any compensation that I know. In your honor's [386] view of the case, we are going to forget one of the partner's interest completely, the value of a going business then earning about \$2,000 a month? We are going to say that his employees, if they were not paid in addition to their normal wages, made no contribution even though for all we know other employees had to be hired to replace them?

The Court: Mr. Bohn, this court has been available to you most of this week where you could have shown any such understanding, but the defendant has shown that Mr. Siciliano said that while he was not present here he did not expect any salary to be collected.

Mr. Bohn: Does it follow from that that his managerial employees who were supervising should not be paid?

The Court: The corporation or the partners never had any contract with Pacific Enterprises, Inc.

Mr. Bohn: I thought we had a general understanding that this was a case where the individual

and his corporation were alter egos. At Mr. Phelan's own request we admitted that they were alter egos so that for all purposes they could be considered alike.

The Court: I do not see how you can consider a corporation, a legal entity, alike for all purposes. It has a different schedule of taxes, different authority, different powers. In other words, what I am saying is that this situation which was projected was not the fault of the corporate defendant. [387] Mr. Siciliano projected it by his inability to be present and to perform the functions. You say "Here we have accomplished this," but it is purely in the realm of conjecture as to how much more he might have accomplished had he been here.

Mr. Bohn: That gets back to the fundamental concept of what this contract means.

The Court: Well, I don't see how the contract could mean anything if it doesn't mean that Mr. Siciliano was to devote his time and energy.

Mr. Bohn: As much as might be agreed upon.

The Court: As much as might be agreed upon. You must remember that Mr. Thompson came out here, entered into this agreement in good faith and was not advised of any projected departure. He made all the arrangements for the operation, relied upon Mr. Siciliano to use his well-known talents and abilities, and while he thinks he is here taking care of their business, he is suddenly awakened at 3 o'clock in the morning and informed that Mr. Siciliano is in San Francisco. Now, just what do you think?

Mr. Bohn: I would like to know what we bought for \$15,000?

The Court: You bought just exactly what you are getting. You bought the physical assets and you bought also the obligation to make a success of the business.

Mr. Bohn: Which I believe we have done. [388]

The Court: A partnership or joint venture which implied the personal assistance of one of the partners and that partner left the partner corporation here without any authorized contact, and you find on the other hand, and I think you should give a great deal of thought to that—it seems to me that Mr. Thompson went just about as far as he could to try and help Mr. Siciliano, try to keep this thing going, trying to keep everything going. In one of the communications here you find that he says to Mr. Turner, “Well, maybe we can appoint another manager if he doesn’t get back.” All this time he is attempting to get the continued assistance and interest of Mr. Siciliano, but where is Mr. Siciliano’s interest? He gets no reports, he doesn’t correspond with anyone; he is just gone.

Mr. Bohn: But the record also shows that reports were sent to Mr. Thompson, that correspondence was frequent between Mr. Thompson and Mr. Turner as well as Mr. Diza.

The Court: Well, Mr. Thompson, of course, testified that he set up the form of report which was apparently carried out but not currently. Now this is a peculiar type of business. In a matter of a

week or two serious things could happen. Certainly people sitting in Seattle were entitled by the 10th of a succeeding month to know what the preceding months' business reflected, not have to wait months and months for the posting of the books.

Mr. Bohn: Yet the testimony is that they are two months behind today as to postings of their books. [389]

The Court: Well, they at least know where they stand because they are one.

Mr. Bohn: They may know but they failed to advise Mr. Siciliano where they stood at any time after they took control.

The Court: I think that is in keeping with their assumption that Mr. Siciliano lost interest in the business.

Mr. Bohn: It is an assumption I feel that I cannot convince the court on this point—an assumption I cannot concur in. The business was run and managed. Mr. Edward Thompson said in response to a question of the court that frankly the second store wasn't opened because the reports were late, but regardless the fact is that the business was run and it made a profit.

The Court: The court has no evidence at all that the type of arrangement that was carried on was ever concurred in by the corporation. The testimony was that when Mr. Siciliano showed up in San Francisco on the 2d day of July he said he would be there not later than two months, that he would be there not more than two months and everything was running along splendidly. Now this is a busi-

ness. You can't run a business without having an active interested head. You can't run a business with a broken cash register for months. You can't run a business without having accurate control over your cash, without having accurate books kept currently. That way lies bankruptcy.

Mr. Bohn: In this particular case—— [390]

The Court: The only reason that you are here today is because it happened to be the type of business for which there was a particularly heavy public demand at the time it was undertaken. If this had been a department store I don't think either one of you would have been here because you wouldn't have any business in 1955.

Mr. Bohn: Well, I have made my presentation to the court. I find nothing additional which I could add that would add any weight to my previous arguments and therefore can do nothing but wait for the decision of the court.

The Court: Well, as I have indicated, this thing has not been firmed up in my thinking. All I have before me is citations of cases which I have had no opportunity to examine into. I haven't had the benefit of a legal brief on either side. I think at this time—I think at this time, and for working purposes I am firm, that Mr. Siciliano is entitled to judgment for an accounting, that he has a continuing lien upon the Dairy Queen for the amount which may be due him and a continuing lien upon the stock which was purchased out of profits for the payment of his judgment. I know I consider it highly impractical to attempt to take over this busi-

ness. I think Mr. Norman Thompson should continue to operate it as it has been operated with the understanding that all cash transactions will cover through the local account and that there shall be no money paid out of that account except for normal expenses. In other words, no [391] distribution of profits or surplus or anything of that kind. Do you agree to that?

Mr. Phelan: Well, there has been none anyway but money has to go to the States for the purchase of supplies, your Honor.

The Court: Well, normal expenses.

Mr. Phelan: There will be no dividends declared.

The Court: In other words I don't want to put this on a basis that either one of these parties has engaged or is interested in engaging in any sharp practice. I don't find that here. I find that these parties have acted with a high degree of integrity in their relationships to each other and I want that to continue. As I suggested, I think you should get together with me and agree upon an accountant unless you are willing to accept a formula which I am prepared to submit to you as representing a basis as of July 1st. I don't think it's a difficult matter at all.

Mr. Bohn: At the conclusion of your Honor's order in this matter I was going to ask if it might be possible for counsel to meet with the court in chambers to discuss some of these matters?

The Court: Yes, then are you prepared to go ahead with the Pacific Enterprises case?

Mr. Bohn: I could but I was prepared to do so at 2:30.

The Court: Do you want to meet with me now before you present the next case? [392]

Mr. Bohn: Yes.

The Court: Very well, the court will recess until approximately a quarter to three.

(The court recessed at 2:15 p.m., February 16, 1955.)

Thursday, February 17, 1955, 10:30 A.M.

The Court: I take it the parties wish to take up the matter of Pacific Enterprises, Inc., vs. American Pacific Dairy Products?

Mr. Bohn: That is correct, your Honor.

The Court: Very well. The court will make the following order in connection with Siciliano vs. American Pacific Dairy Products, Inc.: (1) The court finds that the plaintiff is entitled to an accounting from the defendant; (2) The court takes the matter under advisement to determine the period of time for which the plaintiff is entitled to an accounting, pending the filing of Findings of Fact, Conclusions of Law and the Judgment of the court; (3) The court finds that the plaintiff is entitled to have the assets of the defendant placed in the custody of the court pending final judgment. Norman Thompson is appointed the trustee for such assets pending final determination of the court, with in-

structions that the business is to be continued as at the present time, that no expenditures are to be made by him or by the defendant except expenditures essential to the continued operation of the business; that all funds received from gross [393] sales are to be deposited in the bank and withdrawn solely for the purpose of business operation; (4) The defendant is enjoined from disposing of its stockholdings, amounting to approximately 70 per cent, in the Guam Frozen Products, Inc., pending final judgment and determination of the court. Now is there any question about that order? The court reserves the right, as suggested, to appoint an accountant unless the parties will come to an agreement as to a satisfactory accountant to audit these books and to determine the amount, as shown by the books, to which the plaintiff is entitled in connection with the accounting.

Mr. Bohn: May I ask one question, your Honor? Will the other books of the corporation be made available for this accounting?

The Court: All books of the American Pacific Dairy Products, Inc., dealing with the financial transactions affecting the Dairy Queen must obviously be made available to the accountant in determining the respective amounts due the parties.

(The court then proceeded with the next case.) [394]

District Court of Guam,
Territory of Guam—ss.

I, Dorothy L. Wilkins, Official Court Reporter for the District Court of Guam, hereby certify the above and foregoing to be a true and correct transcript of the stenographic shorthand notes taken in the above-numbered case at the said time and place as set forth.

/s/ DOROTHY L. WILKINS,
Official Court Reporter. [395]

[Title of District Court and Cause.]

DOCKET ENTRIES

9-20-54:

1. Fld Complaint.

Issd Summons & 3 copies & 2 copies of Complaint to U.S. Marshal.

9-23-54:

2. Fld copy of Summons and served by US Marshal—Am Pac Dairy Products, Inc., et al.

10-13-54:

3. Filed Affid of service of Notice of Motion etc.—Am Pacific Dairy Products, Inc.

4. Filed Notice of Motion. Hng set for Oct 22—Am Pac Dairy, etc.

5. Filed sp appr & Mtn to Diss—Am Pac Dairy, etc.

10-13-54:

6. Filed Affidavit of Norman Thompson, (copy of).

7. Filed mtn for more definite statement & mtn to Strike—Am Pac Dairy, etc.

8. Filed memo of points & authorities of mtns of defts Am Pac Dairy—& Norman Thompson.

9. Filed Affid of service of Notice of Motion, etc.—Norman Thompson.

10. Filed Notice of Motion. Hng set for Oct 22—Norman Thompson.

11. Filed sp appr & mtn ti Diss—Norman Thompson.

12. Filed Affidavit of Norman Thompson.

13. Filed Affidavit of Finton J. Phelan, Jr.

14. Filed mtn for more definite statement—Norman Thompson.

15. Filed copy memo of points & authorities of mtns of defts Am Pac Dairy & Norman Thompson.

10-22-54—Hearing on Motions:

Arguments had. Mtn to Diss denied. Ct takes jurisd. Ct gnts other mtns in part. Pltf given 10 days to file Amend Complaint.

10-26-54:

16. Filed Amended Complaint.

11-5-54:

17. Filed Sp appear & Mtn to Diss. (Deft.)
18. Filed Mtn for Change of Venue, etc. (Deft.)
19. Filed Mtn for more Definite Statement & Mtn to Strike.
20. Filed Notice of Motions. Hng set for Dec 3.

12-3-54—Hearing:

Attys present. Arguments had. Deft's Mtms all denied. Deft given 20 days to answer.

12-23-54:

21. Filed Answer and Cross-Complaint.
22. Filed Affid of service of Ans & Cross-Complaint.

1-18-55:

23. Fld Notice of Taking Deposition.
24. Fld Notice to Take Deposition.
25. Fld Deposition Subpoena to Testify, etc., endorsed served Jan 17.

1-19-55:

26. Fld Reply to Counterclaim.
27. Fld Notice of Motion re tak of Dep of Edw Thompson. Hng set for Jan 28.

1-21-55—Forthwith Hearing:

Plaintiff appears by John A. Bohn, his attorney. Defendant appears by Finton J. Phelan, Jr., its attorney. By oral agreement between attorneys, statutory notice waived and hearing had forthwith. Pursuant to the provisions of Rule 30 (b) of the Federal Rules of Civil Procedure, Ordered that deposition of Edward Thompson be taken at 9:30 a.m. in the Legislative Building, Agana, Guam. Pre Tr Conf ord on Jan 26.

1-26-55—Pretrial Conference:

Attys for respective parties present. Action in Civ Case No. 68-54, Pacific Enterprises, Inc. vs. American Pacific Dairy Product, Inc. is consolidated with this action for purposes of trial and the two cases have been set for trial February 14. Pretrial order to be fld.

1-26-55:

28. Fld Pretr Ord.

1-27-55:

29. Fld copy of clk's ltr advising attys re filing of Pretr Ord & trial date.

2-2-55:

30. Fld Request for Admission of Facts.

2-4-55:

31. Fld Deposition of Edward Thompson.

2-9-55:

32. Fld Mtn to Amend Cross-Complaint.
33. Fld Amend Cross-Complnt.
34. Fld Mtn for Continuance.
35. Fld Mtn for Severance.
36. Fld demand for jury trial.
37. Fld Affid of Edward Thompson.
38. Fld Affid of Norman Thompson.
39. Fld Affid of Finton J. Phelan, Jr.
40. Fld Mtn to shorten time for hearing mtns.
41. Fld Notice of Motions for hearing on mtns filed this day.
42. Fld Ex Parte Ord set hng on Mtns for Feb 11.

2-10-55:

43. Fld Ojections ans Answers to Requests for Admissions.
44. Fld Notice of hng of objections & mtns pertinent thereto. Hng Feb. 11.
45. Fld Order allowing service of Notice & Objections prior to Feb. 10.
46. Fld subpoena to Produce—Joseph A. Siciliano.
47. Fld Dep subpoena to testify—Henry Diza.

2-10-55:

48. Fld Notice to Tak of Dep of deft—Siciliano.

49. Fld Notice of Tak of Dep of deft—Am Pac Dairy Prod.

50. Fld Affid of Serv of copy of Notice of Tak of Dep—Siciliano.

51. Fld Affid of Serv of copy of Notice of Tak of Dep—Diza.

2-11-55—Hearing on Motions: Hvng hrd arguments of attys for respective parties, Ct Ord that the following qtns in the Request for Admission of Facts, fld Feb 2 shld be answered: 1, 2, 3, 4, 5 & 16. Mtn to Amend and Mtn for Continuance were denied.

2-14-55—Trial:

Fld Pltf Exhs 1-6, inc. Evid taken until 5 p.m. Ct recessed until Feb 15 at 9:30 a.m.

2-15-55—Trial Resumed:

Tkng of evid on behalf of pltf cont'd until pltf rested. Deft mvd for dismsl; mtn denied. Fld Deft Exhs A-L, inc., & Pltf Exh 7. Evid taken on behalf of deft until 5 p.m. Ct recessed until Feb 16 at 9 a.m.

2-16-55—Trial Resumed:

Tkng of evid on behalf of deft cont'd & on

cross-exam Addendum to Deft Exh I was offered in evid & was accepted w/o obj & filed. At conclusion of evid, defense rested. Ct ord Deft's Counter-claim dismsd. No rebuttal testimony. Ct expressed his oral opn stating that it was not the Ct's judgment or the Ct's findings of fact. Arguments presented until 2:20 p.m. Ct recessed until Feb 17 at 10:30 a.m.

2-17-55—Trial Resumed:

Ct made the following order in connection with *Siciliano vs. American Pacific Dairy Products, Inc.*: (1) The Court finds that the plaintiff is entitled to an accounting from the defendant; (2) The Court takes the matter under advisement to determine the period of time for which the plaintiff is entitled to an accounting, pending the filing of findings of fact, conclusions of law and the judgment of the Court; (3) The Court finds that the plaintiff is entitled to have the assets of the defendant placed in the custody of the Court pending final judgment. Norman Thompson is appointed the trustee for such assets pending final determination of the Court with instructions that the business is to be continued as at the present time, that no expenditures are to be made by him or by the defendant except expenditures essential to the continued operation of the business; that all funds received from gross sales are to be deposited in the bank and withdrawn solely for the purpose of business operation; (4) The defendant is en-

joined from disposing of its stockholdings, amounting to approximately 70 per cent, in the Guam Frozen Products, Inc., pending final judgment and determination of the Court.

2-18-55:

51a. Fld receipt for Deft Exhs from Mr. Thompson, trustee.

52. Filed Interlocutory Judgment.

3-2-55:

53. Filed Opinion.

3-4-55:

54. Filed copy of clk's ltr of transm of copies of Opinion to attys.

3-19-55:

55. Filed Notice of Appeal from Interl Decree of 1-18-55.

56. Filed Bond for costs on appeal.

3-22-55:

57. Filed copy of ltr of transm of notice of appeal to atty for pltf.

3-25-55:

58. Filed Stip Ext time to file F's of F, Cs of L, Decree Ord. to 10 days from March 23, Approved by Ct.

4-7-55:

59. Filed Suppl F's of F, Cs of L.

60. Filed Judgt for pltf for \$38,023.31 & costs.

61. Filed copy of Notice to attys of Judgt.

4-14-55:

62. Filed pltf's Memo of costs & Disbursements.

4-18-55:

63. Filed deft's mtn for fixing supersedeas bond. Mtn approved for \$40,000 bond.

4-21-55:

64. Filed Motion for extention of time for docketing & filing record on appeal to June 10, 1955. So ordered by Ct.

4-25-55:

65. Attys notified on taxing of costs 4-29-55 at 9:00 a.m.

4-29-55—Forthwith Hrng for Reset:

Ord hrng for taxing of costs set for May 6.

4-30-55:

66. Fld Notice of Appl.

5-2-55:

67. Fld copy of clk's ltr advsng atty for pltf of Notice Appl.

68. Fld Supersedeas Bond, duly executed & appvd by Ct.

5-5-55:

69. Fld pltf's Notice of Appl.

5-6-55:

70. Fld copy of clk's ltr advsng atty for deft of Notice of Appl.

Hng on Tax of Costs:

Attys present. Ct disallows items 6 & 8 of Bill of costs. Costs txed in sum of \$60.45.

5-25-55:

71. Fld Ord Taxing Costs.

6-4-55:

72. Fld Pltf's Bond for Costs on Appl.

6-7-55:

73. Fld deft's mtn & Ct Ord extending for 15 days the time within which to docket & file record on appl.

6-20-55:

74. Fld Statement of Points on which appellant intends to Rely.

75. Fld Designation of Contents of record on appeal.

76. Fld Court Reporters Transcript of Proceedings in 4 volumes.

77. Fld copy of Ans to Requests for Admissions.

(A true copy.)

[Seal] /s/ ROLAND A. GILLETTE,
Clerk.

[Title of District Court and Cause.]

Minutes

10-13-54:

A Motion to Dismiss, Motion to Strike and Motion for More Definite Statement, having been filed this day by the defendant American Pacific Dairy Products, Inc., Ordered hearing on motions set for hearing on Friday, October 22, 1954, at 9:30 a.m.

A Motion to Dismiss, Motion to Strike and Motion for More Definite Statement, having been filed this day by the defendant Norman Thompson, Ordered hearing on motions set for hearing on Friday, October 22, 1954, at 9:30 a.m

10-22-54—Hearing on Motions:

Plaintiff appears by John A. Bohn, his attorney. Defendants American Pacific Dairy Products, Inc., and Norman Thompson appear by Finton J. Phelan, Jr., their attorney.

Having heard the arguments of the attorneys, court denies motion to Dismiss and holds it has jurisdiction in the First cause of action over the defendants served and further holds that Second cause of action does not state a cause of action. Plaintiff given ten (10) days in which to file an Amended Complaint.

11-5-54:

Notice of Motions to Dismiss, Change of Venue, More Definite Statement, and to Strike having been filed this day, Ordered that hearing on said motions be had on Friday, December 3, 1954, at 9:30 a.m.

12-3-54—Hearing:

Plaintiff appears by John A. Bohn, his attorney. Defendant appears by Finton J. Phelan, Jr., its attorney. Having heard the arguments of the attorneys for the respective parties, Ordered defendant's Motion to Quash, Motion for Change of Venue and Motion for More Definite Statement, all denied. Defendant given twenty (20) days in which to answer.

1-19-55:

Notice of Motion to vacate notice of taking of deposition of one Edward Thompson, having been filed this day, Ordered hearing on said motion be had on Friday, January 28, 1955, at 9:30 a.m.

1-21-55:

Plaintiff appears by John A. Bohn, his attorney. Defendant appears by Finton J. Phelan, its attorney. By oral agreement between attorneys, statutory notice waived and hearing on defendant's motion had forthwith. Court grants motion and orders deposition of one Edward Thompson be taken at 9:30 a.m. Tuesday, January 25, 1955, in the Legislative Building, Agana, Guam, pursuant to the provisions of Rule 30 (b) of the Federal Rules of Civil Procedure. Ordered Pretrial Conference set for Wednesday, January 26, 1955, at 9:30 a.m.

1-26-55—Pretrial Conference:

Plaintiff appears by John A. Bohn, his attorney. Defendants appear by Finton J. Phelan, Jr., their attorney. The action in Civil Case No. 68-54, Pacific Enterprises, Inc., vs. American Pacific Dairy Products, Inc., is consolidated with this action for purposes of trial and the two cases have been set for trial Monday, February 14, 1955, at 9:30 a.m. Pretrial order to be filed.

2-10-55:

Ordered hearing on all motions filed on February 9th and 10th be had on Friday, February 11, 1955, at 9:30 a.m.

2-11-55—Hearing on Motions:

Having heard the arguments of the attorneys for the respective parties, the Court Ordered that the following questions in the Request for Admission of Facts, filed February 2, 1955, should be answered: 1, 2, 3, 4, 5 and 16. Motion to Amend and Motion for Continuance were denied.

2-14-55—Trial:

Plaintiff appeared in person and with John A. Bohn, his attorney.

Defendant appeared by Edward Thompson and with Finton J. Phelan, Jr., its attorney.

Court directed all witnesses to remain outside the courtroom until called upon to testify, except one (1) witness for the plaintiff.

Thereupon came the evidence on behalf of the plaintiff and certain documents marked plaintiff Exhibits 1 through 6, inclusive, were offered in evidence and were accepted without objection and filed. Taking of evidence continued until the hour of 5:00 o'clock p.m. Court recessed until the following day, Tuesday, February 15, 1955, at the hour of 9:30 o'clock a.m.

2-15-55—Trial Resumed:

All parties present as heretofore. Taking of evidence on behalf of the plaintiff continued and at the conclusion of the evidence the plaintiff rested. Defendant through its attorney moved for dismissal. Motion was denied. Thereupon came the evidence on behalf of the defendant and certain documents marked Defendant Exhibits A through F, inclusive, and H through L, inclusive, were offered in evidence and were accepted without objection and filed; a certain document marked Defendant Exhibit G was offered in evidence and was accepted with a stipulation and filed. On cross-examination a certain document marked Plaintiff Exhibit 7 was offered in evidence, objected to, and was accepted over the objection and filed. Evidence taken until the hour of 5:00 o'clock p.m. Court recessed until the following day, Wednesday, February 16, 1955, at the hour of 9:00 o'clock a.m.

2-16-55—Trial Resumed:

All parties present as heretofore. Taking of evidence on behalf of the defendant continued and certain document marked Addendum to Defendant Exhibit I was offered in evidence and was accepted without objection and filed. At the conclusion of the evidence, the defense rested. The Court Ordered that the Defendant's Counterclaim be and it hereby

is dismissed. No rebuttal testimony. The Court expressed his oral opinion stating that it was not the Court's judgment or the Court's findings of fact. Arguments presented until hour of 2:20 o'clock p.m. Court recessed until the following day, Thursday, February 17, 1955, at the hour of 10:30 o'clock a.m.

2-17-55—Trial Resumed:

All parties present as heretofore. The Court made the following order in connection with *Siciliano vs. American Pacific Dairy Products, Inc.*: (1) The Court finds that the plaintiff is entitled to an accounting from the defendant; (2) The Court takes the matter under advisement to determine the period of time for which the plaintiff is entitled to an accounting, pending the filing of findings of fact, conclusions of law and the judgment of the Court; (3) The Court finds that the plaintiff is entitled to have the assets of the defendant placed in the custody of the Court pending final judgment. Norman Thompson is appointed the trustee for such assets pending final determination of the Court with instructions that the business is to be continued as at the present time, that no expenditures are to be made by him or by the defendant except expenditures essential to the continued operation of the business; that all funds received from gross sales are to be deposited in the bank and withdrawn solely for the purpose of business operation; (4) The

defendant is enjoined from disposing of its stockholdings, amounting to approximately 70 per cent, in the Guam Frozen Products, Inc., pending final judgment and determination of the Court.

The following named persons were duly sworn and testified during the course of the trial:

For the Plaintiff

1. Joseph A. Siciliano.
2. Joseph Meggo.
3. Edward Thompson.
4. Ernesto O. Diza.

For the Defendant

1. Edward Thompson.
2. Norman Thompson.

4-29-55—Forthwith Hearing for Resetting:

Plaintiff appeared by J. J. Novak, his attorney. Defendant appeared by Finton J. Phelan, Jr., its attorney. Having heard the attorneys for the respective parties, the Court Ordered that hearing for the purpose of determining costs be set for Friday, May 6, 1955, at 9:30 a.m.

5-6-55—Hearing on Taxation of Costs:

Plaintiff appears by J. J. Novak, his attorney. Defendant appears by Finton J.

Phelan, Jr., his attorney. Having heard the arguments of the attorneys for the respective parties, court disallows items No. 6 and 8 of the Bill of Costs filed on April 14, 1955, and taxes costs in the sum of sixty and 45/100 dollars (\$60.45).

(A true copy.)

[Seal] /s/ ROLAND A. GILLETTE,
 Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Roland A. Gillette, Clerk of the District Court of Guam for the Territory of Guam, M. I., do hereby certify that the following documents, to wit:

1. Complaint, filed September 20, 1954.
2. Special appearance and Motion to Dismiss, filed October 13, 1954.
3. Amended Complaint, filed October 26, 1954.
4. Special Appearance and Motion to Dismiss, filed November 5, 1954.
5. Motion for Change of Venue on the ground of convenience of parties and witnesses in the interest of Justice, filed November 5, 1954.
6. Motion for More Definite Statement and Motion to Strike, filed November 5, 1954.
7. Answer and Cross-Complaint, filed December 23, 1954.

8. Reply to Counterclaim, filed January 19, 1955.
9. Pretrial Order filed January 26, 1955.
10. Request for Admission of Facts, filed February 2, 1955.
11. Amended Cross-Complaint, filed February 9, 1955.
12. Demand for Jury Trial, filed February 9, 1955.
13. Objections and Answers to Requests for Admission, filed February 10, 1955.
14. Interlocutory Judgment, filed February 18, 1955.
15. Opinion, filed March 2, 1955.
16. Notice of Appeal, filed March 19, 1955.
17. Supplemental Findings of Fact and Conclusions of Law, filed April 7, 1955.
18. Judgment, filed and entered April 7, 1955.
19. Motion to Stay, filed April 18, 1955.
20. Notice of Appeal, filed April 30, 1955.
21. Supersedeas and Cost Bond on Appeal, filed May 2, 1955.
22. Notice of Appeal, filed May 5, 1955.
23. Order: Taxing Costs, filed May 25, 1955.
24. Bond for Costs on Appeal, filed June 4, 1955.
25. Statement of Points on which Appellant Intends to Rely, filed June 20, 1955.
26. Designation of Contents of Record on Appeal, filed June 20, 1955.
27. Answers to Requests for Admission, filed June 23, 1955.
28. Certified copy of the Docket entries.
29. Certified copy of Clerk's Minutes.

30. Court Reporter's Transcript of Proceedings, volumes "A," "B," & "C," filed June 20, 1955, are the original or certified copies of the original documents filed in the office of the clerk in the above-entitled case.*

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of the aforesaid court at Agana, Guam, M. I., this 23rd day of June, A.D. 1955.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk of the Court.

[Endorsed] No. 14805. United States Court of Appeals, for the Ninth Circuit. American Pacific Dairy Products, Inc., a Corporation, Appellant, vs. Joseph A. Siciliano, Appellee. Joseph A. Siciliano, Appellant, vs. American Pacific Dairy Products, Inc., a Corporation, Appellee. Transcript of Record. Appeals from the District Court for the District of Guam, Territory of Guam.

Filed: June 25, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

*Exhibits set forth on Supplemental Certificate.

In the United States Court of Appeals
for the Ninth Circuit

Nos. 14805 and 14806

AMERICAN PACIFIC DAIRY PRODUCTS,
INC., a Corporation,

Defendant-Appellant,

vs.

JOSEPH A. SICILIANO,

Plaintiff-Appellee.

and

AMERICAN PACIFIC DAIRY PRODUCTS,
INC.,

Defendant-Appellant,

vs.

PACIFIC ENTERPRISES, INC.,

Plaintiff-Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY AND
DESIGNATION OF THE RECORD TO
BE PRINTED

Appellant in the above-entitled causes hereby adopts as its statement of points on which it intends to rely in this appeal the statement of points as they now appear in the transcript of the records filed herein.

Appellant hereby designates for printing the entire certified transcript of the records save and except that portion which covers the exhibits.

Dated this 1st day of July, 1955.

/s/ BURLMAN ADAMS, of

LITTLE, LeSOURD, PALMER,
SCOTT & SLEMMONS,
Attorneys for Appellant.

FINTON J. PHELAN, JR.,
Attorney for Appellant.

Service of copy acknowledged.

[Endorsed: Filed August 10, 1955.]

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
PLAINTIFF-APPELLEE AND CROSS-AP-
PELLANT INTENDS TO RELY AND DES-
IGNATION OF RECORD

Plaintiff-Appellee and Cross-Appellant in the above-entitled causes hereby adopts as its statement of points on which it intends to rely in this appeal, the statement of points as they now appear in the transcript of the record filed herein.

The Defendant-Appellant and Cross-Appellee has already designated the entire certified transcript of the record save and except that portion which covers

the exhibits, and therefore, Plaintiff-Appellee and Cross-Appellant does not designate any portion of the Record for printing.

Dated this 7th day of September, 1955.

/s/ JOHN A. BOHN,
Attorney for Plaintiff-Appellee and Cross-Appellant.

[Endorsed]: Filed September 8, 1955.